



1995

## The Neighbors Are Watching: Targeting Sexual Predators with Community Notification Laws

Christine M. Kong

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Christine M. Kong, *The Neighbors Are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 Vill. L. Rev. 1257 (1995).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol40/iss4/7>

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1995]

## Comment

### THE NEIGHBORS ARE WATCHING: TARGETING SEXUAL PREDATORS WITH COMMUNITY NOTIFICATION LAWS

#### I. INTRODUCTION

In the wisdom of society's gatekeepers on such matters, he moved into a quiet neighborhood in Hamilton Township, New Jersey, with two other "recovering" sexual offenders. He made friends with the neighborhood kids, letting them play with his puppy. Because he was considered a quiet and gentle man, he was able to lure his little neighbor Megan Kanka, 7, to a heinous death. He raped and strangled her.<sup>1</sup>

The tragic story of Megan Kanka's death is not uncommon; her slaying is one of many murders that involved a violent crime and a young victim.<sup>2</sup> The brutal nature of these crimes, and the crime against Megan

1. Suzanne Fields, *We Should Lock Them Up for Life: Megan's Law Doesn't Really Protect Society from Sexual Predators*, ATLANTA J., Mar. 6, 1995, at A8. The "he" in the quotation, who stands accused of the murder of Megan Kanka, is Jesse Timmendequas, a convicted pedophile. See James Popkin, *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 65, 66 (detailing history and accusations against Timmendequas). Prior to Megan Kanka's rape and murder, Timmendequas and two other convicted child abusers had moved into a house across the street from the Kankas' home. *Id.* at 66. Timmendequas allegedly lured Megan Kanka into his house and then sexually assaulted and strangled her. *Id.* For additional media reports of the Kanka murder and the frenzy to enact protective legislation following the crime, see Jennifer Buksbaum, *N.J. Victims' Parents See Crime Bill Signed Urge Action To Protect Others' Children*, THE RECORD (Northern N.J.), Sept. 14, 1994, at A17; Malcolm Gladwell, *N.J. Law on Released Sex Offenders Proves Problematic: Ex-Inmates Must Report Addresses, but Enforcement Is Burdensome, Some Are Harassed*, WASH. POST, Jan. 16, 1995, at A6; Richard Jerome, *Megan's Legacy*, PEOPLE, Mar. 20, 1995, at 46.

2. See, e.g., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1993, at 385 (Kathleen Maguire & Ann L. Pastore eds., 1994) (noting 1992 murder rate of United States victims under age 13 to be 1.8 per 100,000 persons). In March of 1994, a formerly convicted sex offender who had a history of sex offenses raped and murdered six-year-old Amanda Wengert of New Jersey. Michelle Ruess, *Megan's Law Signed By Governor*, THE RECORD (Northern N.J.), Nov. 1, 1994, at A1. Twenty-one-year-old Kevin Aquino plead guilty to Wengert's murder. Sheri Tabachnik & Lisa L. Colangelo, *Doubts Linger Over Bargain With Killer*, ASBURY PARK PRESS, July 28, 1995, at A11. In 1989, Westley Allan Dodd kidnapped, raped, tortured and murdered four-year-old Lee Iseli. Joanne Jacobs, *Punish Sexual Predators*, THE RECORD (Northern N.J.), Jan. 18, 1993, at A11. Dodd stated that if released, he would rape and kill again. *Id.* Therefore, Dodd refused to appeal his death sentence and requested hanging as a fit punishment. *Id.* In another 1989 crime, a previously convicted sex offender raped, stabbed, strangled and sexually mutilated a seven-year-old Washington state boy. David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 525 (1992). The boy was found in a

Kanka in particular, has fired public outrage over the release of convicted sex offenders into our communities.<sup>3</sup> In response, within approximately three months after Megan Kanka's death, New Jersey Governor Christine Todd Whitman signed into law a package of bills designed to deal more harshly with sex offenders.<sup>4</sup> Certain provisions of the new law, popularly referred to as Megan's Law, prescribe procedures for notifying area residents when a released sex offender moves into their community.<sup>5</sup>

---

wooded area near his home in a state of shock: he had been violently raped, stabbed in the back, strangled with a cord and had his penis severed. *Id.* at 525-26. The young victim's attacker, Earl Shriner, was a repeat offender with a criminal history dating back to 1966. *Id.* at 526 (quoting *Past Sex Offender Suspect in Attack — Boy Too Traumatized to Cry by Mutilation*, TACOMA MORNING NEWS TRIB., May 22, 1989, at A1). In response to public outrage over the attack, lawmakers of the State of Washington enacted the Community Protection Act of 1990. Jacobs, *supra* at A11; see Community Protection Act, ch. 3, §§ 101-1406, 1990 Wash. Laws 12 (codified as amended in scattered sections of WASH. REV. CODE). The Community Protection Act contains 14 separate sections addressing topics such as the registration of released sex offenders, crime victims' compensation, community notification, sexual motivation in criminal offenses, criminal sentencing, civil commitment and background checks. *Id.* For an overview of the Community Protection Act, see Norm Maleng, *The Community Protection Act and the Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 821 (1992). For other articles discussing sex crimes against child victims, see Daniel Golden, *Sex-Cons*, BOSTON GLOBE (Sunday Magazine), Apr. 4, 1993, at 12; David A. Kaplan, *The Incorrigibles*, NEWSWEEK, Jan. 18, 1993, at 48.

3. Lisa Anderson, *Demand Grows to ID Molesters: States Weigh Children's Safety Versus Offenders' Rights*, CHI. TRIB., Aug. 15, 1994, at 1; see also Stephen Chapman, *Lowering the Boom on Sex Offenders: Is There a Better Way?* CHI. TRIB., Aug. 21, 1994, at 3 (noting that sexual predator crime issue "provok[ed] rallies . . . and groundswell[s] in Congress" demanding better protections against risk that predators pose).

4. See, e.g., N.J. STAT. ANN. § 2C:7-6 to -7 (West 1995) (requiring community notification concerning release of certain sex offenders); *id.* § 2C:7-8 (establishing system to determine risk of re-offense released sex offender poses to community and correspondingly providing for notification to police, neighbors, community organizations and schools about threatening offenders living in area); *id.* § 2C:7-2 to -5 (requiring released sex offenders to register with local police); *id.* §§ 2C:43-7, 2C:44-3 (providing for sentencing of sexually violent predators); *id.* § 2C:47-3 to -5 (authorizing involuntary civil commitment of mentally ill and dangerous sexual offenders); *id.* § 30:4-123.53a (requiring Department of Corrections to notify prosecutors before sex offenders or other violent criminals are released and correspondingly prosecutors to notify Office of Victim-Witness Advocacy and local law enforcement); *id.* § 2C:43-6.4 (permitting sentence of community supervision for life for certain sex offenders); *id.* § 2C:47-8 (making repeat and compulsive sex offenders at Adult Diagnostic and Treatment Center in Avenel, New Jersey, ineligible for early release due to "good behavior" if they refuse therapy); *id.* § 2C:44-3g (allowing prosecutors to seek extended sentence for violent sex offenders whose victims are younger than age 16).

5. N.J. STAT. ANN. § 2C:7-6 to -9 (West 1995) (providing for community notification regarding release of certain convicted offenders). The provision that provides for notice to residents when a convicted sex offender moves into their community after his or her release from prison is one of the more controversial measures of the New Jersey sex offender laws. Compare Bruce Fein, *When a Sex Offender Moves in, Is There a Duty to Warn the Community? Yes: Community Self-Defense Laws Are Constitutionally Sound*, A.B.A. J., Mar. 1995, at 38 (arguing that community

Megan's Law is based on the popular belief that if residents had known a convicted sex offender was living in their township, they may have been able to prevent Megan Kanka's death.<sup>6</sup> This issue of "knowledge"

notification laws do not constitute punishment in constitutional sense and do not violate right to privacy) with Edward Martone, *When a Sex Offender Moves in, Is There a Duty to Warn the Community? No: Mere Illusion of Safety Creates Climate of Vigilante Justice*, A.B.A. J., Mar. 1995, at 39 (asserting community notification laws cause compulsive sex offenders to run from family, avoid treatment and seek anonymity by hiding out, thus subjecting public to greater risk); see Ben Gerson, *Does New York Need a 'Megan's Law'?*, NEWSDAY, Jan. 22, 1995, at A43 (noting arguments for and against enactment of community notification laws in New York State).

The amendments to Title 2C of the New Jersey Statutes provide in pertinent part:

c. The regulations shall provide for three levels of notification depending upon the risk of re-offense by the offender as follows:

(1) If risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified;

(2) If risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified in accordance with the Attorney General's guidelines, in addition to the notice required by paragraph (1) of this subsection;

(3) If risk of re-offense is high, the public shall be notified through means in accordance with the Attorney General's guidelines designed to reach members of the public likely to encounter the person registered, in addition to the notice required by paragraphs (1) and (2) of this subsection.

d. In order to promote uniform application of the notification guidelines required by this section, the Attorney General shall develop procedures for evaluation of the risk of re-offense and implementation of community notification. These procedures shall require, but not be limited to, the following:

(1) The county prosecutor of the county where the person was convicted and the county prosecutor of the county where the registered person will reside, together with any law enforcement officials that either deems appropriate, shall assess the risk of re-offense by the registered person;

(2) The county prosecutor of the county in which the registered person will reside, after consultation with local law enforcement officials, shall determine the means of providing notification; and

e. The Attorney General's guidelines shall provide for the manner in which records of notification provided pursuant to this act shall be maintained and disclosed.

N.J. STAT. ANN. § 2C:7-8 (West 1995).

In addition, the law provides that "any person who provides or fails to provide information relevant to the procedures set forth in this act shall not be liable in any civil or criminal action," but that nothing in this act "shall be deemed to grant any such immunity to any person for his willful or wanton act of commission or omission." *Id.* § 2C:7-9. Finally, the law provides that nothing in the act shall be "construed to prevent law enforcement officers from providing community notification concerning any person who poses a danger under circumstances that are not provided for in this act." *Id.* § 2C:7-10.

6. Chapman, *supra* note 3, at 3 (reporting that Megan Kanka's parents could have kept Megan away from man who confessed to Megan's murder had they known of his prior convictions for sexual molestation); see also Tom Avril, *Legal Challenges Arise for Megan's Law: Community Notification Provisions Have Run Into*

goes to the heart of the debate; questions exist concerning the efficacy and constitutionality of community notification laws.<sup>7</sup>

Laws directed at released sex offenders, however, are not new. A majority of state legislatures have enacted statutes that require sex offenders to register with local law enforcement authorities upon their release from prison.<sup>8</sup> In addition, a few state statutes provide for the involuntary civil commitment of dangerous sex offenders.<sup>9</sup> Finally, a growing number of states have followed New Jersey's lead and have enacted laws that permit community notification.<sup>10</sup> In light of the community notification provisions of the Federal Crime Bill,<sup>11</sup> it appears that community notification laws are gaining wide acceptance, and that the American public's demand for the protection of potential victims has at long last taken precedence over the rights of released offenders to return to society unobtrusively.

This Comment examines the various forms of sex offender legislation and focuses on the current interest in the enactment of community notification laws. First, in Part II(A), this Comment discusses the various state approaches to sex offender legislation: state laws that provide for the registration of released sex offenders; laws that mandate the civil commitment of certain offenders; and laws that provide notice to residents when a released offender moves into their community.<sup>12</sup> Second, in Part II(B), this Comment examines the Federal Crime Bill and its provisions that mandate the establishment of community notification programs in each state.<sup>13</sup> Third, Parts III and IV address the potential problems inherent in

---

*Trouble in the Courts*, PHILA. INQUIRER, Mar. 5, 1995, at E3 (reporting opinion of Sen. Stewart J. Greenleaf (R., Montgomery) that putting citizens on guard is best way to prevent future crimes).

7. See, e.g., *Artway v. Attorney General*, 876 F. Supp. 666, 671-92 (D.N.J. 1995) (discussing challenges to constitutionality of New Jersey's Sexual Offender Registration Act); *Doe v. Poritz*, 662 A.2d 367, 387-422 (N.J. 1995) (same); *State v. Babin*, 637 So. 2d 814, 824 (La. Ct. App.) (discussing constitutionality of Louisiana notification law), *cert. denied*, 664 So. 2d 649 (La. 1994). For a further discussion of *Artway*, see *infra* notes 97-100 and accompanying text. For a further discussion of *Doe*, see *infra* notes 101-12 and accompanying text. For a further discussion of *Babin*, see *infra* notes 113-16 and accompanying text.

8. For a discussion of state statutes that require released sex offenders to register with local law enforcement officials, see *infra* notes 23-35 and accompanying text.

9. For a discussion of state statutes that provide for the involuntary civil commitment of sex offenders, see *infra* notes 36-76 and accompanying text.

10. For a listing and discussion of state community notification statutes, see *infra* notes 77-119 and accompanying text.

11. 42 U.S.C.A. § 14071 (West 1995). The Federal Crime Bill requires all states to establish community notification programs for released sex offenders. *Id.* The states have until September 13, 1997 to institute notification programs. *Id.* For a further discussion of select provisions of the Federal Crime Bill, see *infra* notes 120-37 and accompanying text.

12. For a discussion of state laws directed toward released sex offenders, see *infra* notes 16-119 and accompanying text.

13. For a discussion of the Federal Crime Bill, see *infra* notes 120-37 and accompanying text.

the use of community notification programs.<sup>14</sup> Finally, Part V of this Comment proposes limited application of community notification programs as a means of protecting citizens.<sup>15</sup>

## II. BACKGROUND

### A. State Laws Directed Toward Released Sex Offenders

Due to the nature of their crimes and the controversy concerning their treatment, the media has given a lot of attention to offenders criminally convicted of sex offenses against children.<sup>16</sup> Moreover, in response to the increasingly outspoken voice of victims' rights advocates, states have enacted a variety of laws to address the perceived threat that sex offenders pose after their release from prison.<sup>17</sup>

Legislation at the state level reflects a movement toward placing increased restrictions on the freedom of released sex offenders.<sup>18</sup> These statutes generally fall into one of three categories, although some states have laws that cover more than one category.<sup>19</sup> The first type of statute

14. For an evaluation of the consequences of community notification and the problems inherent in disclosure systems, see *infra* notes 138-76 and accompanying text.

15. For concluding remarks proposing limited application of community notification provisions, see *infra* notes 177-92 and accompanying text.

16. See generally, Popkin, *supra* note 1. For a board-certified psychiatrist's perspective concerning the difficulty of legislatively classifying persons as sexual predators, see James D. Reardon, *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849 (1992).

17. See Golden, *supra* note 2, at 12 (discussing growing community interest in receiving notification); Nekesa Mumbi Moody, *State to Permit Access to Records of Sex Offenders*, BUFF. NEWS, July 26, 1995, at A9 (noting New York is latest state to adopt a "Megan's Law"). For a discussion of state registration statutes, see *infra* notes 23-35 and accompanying text. For a discussion of civil commitment statutes, see *infra* notes 36-76 and accompanying text. For a discussion of state community notification programs, see *infra* notes 77-119 and accompanying text.

18. See, e.g., Doe v. Poritz, 662 A.2d 367, 387-88 (N.J. 1995) (noting pace of recently-adopted community notification laws suggests notification laws may become as common as registration statutes).

19. See, e.g., WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1995) (requiring sex offenders to register); *id.* §§ 71.09-010 to -120 (West 1992 & Supp. 1995) (providing for civil commitment of certain offenders); *id.* § 4.24.550 (West Supp. 1995) (authorizing law enforcement officials to disseminate registrant information to community residents). Since 1990, a majority of the states have enacted registration programs, a minority of the states have enacted civil re-commitment statutes and a growing number of states have enacted community notification statutes. See, e.g., ALA. CODE § 13A-11-200 (1994) (registration statute); ALASKA STAT. § 12.63.010 (Supp. 1994) (same); ARIZ. REV. STAT. ANN. § 13-3821 (Supp. 1994) (same); CAL. PENAL CODE § 290 (West 1988 & Supp. 1995) (same); COLO. REV. STAT. §§ 16-13-201 to -216 (1986 & Supp. 1994) (civil commitment statute); D.C. CODE ANN. §§ 22-3503 to -3511 (1989) (same); FLA. STAT. ANN. § 775.22 (West Supp. 1995) (same); LA. REV. STAT. ANN. § 15:546A (West Supp. 1995) (notification statute); N.J. STAT. ANN. § 2C:7-6 (West 1995) (same); OR. REV. STAT. § 181.508(2) (Supp. 1994) (community notification statute); TENN. CODE ANN. § 40-39-106(c) (Supp. 1995) (same); WASH. REV. CODE ANN. §§ 71.09-010 to -120

requires released sex offenders to register with the local law enforcement officials of the community into which they move.<sup>20</sup> The second type of statute provides for the involuntary civil commitment of convicted sex offenders after the offenders have served their prison sentences.<sup>21</sup> The third type of statute requires that notification be given to community residents when a released sex offender moves into their neighborhood.<sup>22</sup>

### 1. State Registration Statutes

State registration statutes directed toward released sex offenders are currently in force in most states.<sup>23</sup> These statutes require that an individual who has been convicted of a certain type of offense register with the local law enforcement authorities of the area into which he or she moves.<sup>24</sup> Typical registration statutes require a registrant to notify local

---

(West 1992 & Supp. 1995) (civil commitment statute). For a discussion of state registration programs, see *infra* notes 23-35 and accompanying text. For a discussion of civil commitment statutes, see *infra* notes 36-76 and accompanying text. For a discussion of state community notification programs, see *infra* notes 77-119 and accompanying text.

20. For a discussion of state statutes that require released sex offenders to register with local law enforcement authorities, see *infra* notes 23-35 and accompanying text.

21. For a discussion of state statutes that provide for the civil commitment of sexual offenders, see *infra* notes 36-76 and accompanying text.

22. For a discussion of state statutes that provide for notice to community residents, see *infra* notes 77-119 and accompanying text.

23. See, e.g., ALA. CODE § 13A-11-200 (1994); ALASKA STAT. § 12.63.010 (Supp. 1994); ARIZ. REV. STAT. ANN. § 13-3821 (Supp. 1994); ARK. CODE ANN. § 12-12-904 (Michie Supp. 1993); CAL. PENAL CODE § 290 (West 1988 & Supp. 1995); COLO. REV. STAT. § 18-3-412.5 (Supp. 1994); DEL. CODE ANN. tit. 11, § 4120 (Supp. 1994); FLA. STAT. ANN. § 775.22 (West Supp. 1995); GA. CODE ANN. § 42-9-44.1 (1995); IDAHO CODE § 18-8304 (Supp. 1995); ILL. ANN. STAT. ch. 730, para. 150 (Smith-Hurd 1992 & Supp. 1995); IND. CODE ANN. §§ 5-2-12-1 to -12, -13 (West Supp. 1995); KAN. STAT. ANN. §§ 22-4901 to -4910 (Supp. 1994); KY. REV. STAT. ANN. §§ 17.510-.540 (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. §§ 15:540-.549 (West Supp. 1995); ME. REV. STAT. ANN. tit. 34-A, §§ 11001-11004 (West Supp. 1994); MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1995); MONT. CODE ANN. §§ 46-23-501 to -507 (1993); NEV. REV. STAT. ANN. §§ 207.151-.157 (Michie 1992 & Supp. 1993); N.H. REV. STAT. ANN. §§ 632-A:11 to :19 (Supp. 1994); N.J. STAT. ANN. § 2C:7-2 to -5 (West 1995); N.D. CENT. CODE § 12.1-32-15 (Supp. 1995); OHIO REV. CODE ANN. §§ 2950.01-.99 (Anderson 1994); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West 1991 & Supp. 1995); OR. REV. STAT. §§ 181.507-.519 (Supp. 1994); R.I. GEN. LAWS § 11-37-16 (1994); S.D. CODIFIED LAWS ANN. §§ 22-22-31 to -39 (Supp. 1995); TENN. CODE ANN. §§ 40-39-101 to -108 (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1995); UTAH CODE ANN. § 77-27-21.5 (1995); VA. CODE ANN. §§ 19.2-298.1 to -298.3 (Michie Supp. 1995); WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1995); W. VA. CODE §§ 61-8F-1 to -8 (Supp. 1995); WIS. STAT. ANN. § 175.45 (West Supp. 1994); WYO. STAT. §§ 7-19-301 to -306 (Supp. 1995); Act of June 9, 1994, 1994 Conn. Acts 94-246; Act of May 3, 1995, 1995 Iowa Legis. Serv. 259 (West); Act of July 13, 1994, 1994 Mich. Pub. Acts 194; Registration of Sexual Offenders, Act No. 24 of Special Session 1995 — No. 1, 1995 Pa. Legis. Serv. (Purdon) (to be codified at 42 PA. CONS. STAT. § 9795).

24. Registration with local law enforcement authorities is generally required regardless of whether the offense was committed within or without the jurisdiction.

authorities when he or she changes residence within the state,<sup>25</sup> specify the duration of the duty to register,<sup>26</sup> and provide procedures whereby an

*See, e.g.*, ALA. CODE § 13A-11-200 (1994); ALASKA STAT. § 12.63.010(a) (Supp. 1994); ARIZ. REV. STAT. ANN. § 13-3821.A (Supp. 1994); ARK. CODE ANN. § 12-12-904(a) (Michie Supp. 1993); CAL. PENAL CODE § 290(a) (West 1988 & Supp. 1995); COLO. REV. STAT. § 18-3-412.5(1) (Supp. 1994); DEL. CODE ANN. tit. 11, § 4120(a) (Supp. 1994); FLA. STAT. ANN. § 775.22(2) (West Supp. 1995); IDAHO CODE § 18-8304(i) (Supp. 1995); ILL. ANN. STAT. ch. 730, para. 150/3 (Smith-Hurd Supp. 1995); IND. CODE ANN. § 5-2-12-5 (West Supp. 1995); KAN. STAT. ANN. § 22-4904(a) (Supp. 1994); KY. REV. STAT. ANN. § 17.510(4)-(5) (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 15:542.A (West Supp. 1995); ME. REV. STAT. ANN. tit. 34-A, § 11003.1 (West Supp. 1994); MINN. STAT. ANN. §§ 243.166.1, .9 (West Supp. 1995); MONT. CODE ANN. § 46-23-504 (1993); NEV. REV. STAT. ANN. § 207.152.1 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 632-A:12 (Supp. 1994); N.J. STAT. ANN. § 2C:7-2 (West 1995); N.D. CENT. CODE § 12.1-32-15.2 (Supp. 1995); OHIO REV. CODE ANN. § 2950.02 (Anderson 1994); OKLA. STAT. ANN. tit. 57, § 584.A (West Supp. 1995); R.I. GEN. LAWS § 11-37-16(a) (1994); TENN. CODE ANN. § 40-39-103 (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 6252-13C.1.2 (West Supp. 1995); UTAH CODE ANN. § 77-27-21.5(5)-(7) (1994); VA. CODE ANN. § 19.2-298.1.C (Michie Supp. 1995); WASH. REV. CODE ANN. § 9A.44.130(1) (West Supp. 1995); W. VA. CODE § 61-8F-2 (Supp. 1995); WIS. STAT. ANN. § 175.45(3) (West Supp. 1994); WYO. STAT. § 7-19-302 (Supp. 1995). For a discussion of the primary issues that confront states when drafting registration statutes, see Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 736-46 (1994) (recommending registration for those committing sexual offenses against adults and children; duration of registration be tied to severity of offense; failure to file be classified as felony offense; and incorporation of public notification provisions in registration statutes regarding certain offenders).

25. *See, e.g.*, ALA. CODE § 13A-11-200 (1994); ALASKA STAT. § 12.63.010(c) (Supp. 1994); ARIZ. REV. STAT. ANN. § 13-3822 (1989); ARK. CODE ANN. § 12-12-904(b)(1) (Michie Supp. 1993); CAL. PENAL CODE § 290(f) (West Supp. 1995); DEL. CODE ANN. tit. 11, § 4120(f) (Supp. 1994); IDAHO CODE § 18-8304(2) (Supp. 1995); ILL. ANN. STAT. ch. 730, para. 150/6 (Smith-Hurd Supp. 1995); IND. CODE ANN. § 5-2-12-8 (West Supp. 1995); KAN. STAT. ANN. § 22-4904(b)(1) (Supp. 1994); KY. REV. STAT. ANN. § 17.510(7) (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 15:542.C (West Supp. 1995); ME. REV. STAT. ANN. tit. 34-A, § 11003.3 (West Supp. 1994); MINN. STAT. ANN. § 243.166.3(b) (West Supp. 1995); MONT. CODE ANN. § 46-23-505 (1993); NEV. REV. STAT. ANN. § 207.152.2 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 632-A:15 (Supp. 1994); N.J. STAT. ANN. § 2C:7-2.d (West 1995); OHIO REV. CODE ANN. § 2950.05 (Anderson 1994); OKLA. STAT. ANN. tit. 57, § 584.B (West Supp. 1995); OR. REV. STAT. § 181.519 (Supp. 1994); R.I. GEN. LAWS § 11-37-16(f) (1994); TENN. CODE ANN. § 40-39-103 (Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1.4 (West Supp. 1995); UTAH CODE ANN. § 77-27-21.5(8) (1995); VA. CODE ANN. § 19.2-298.1C (Michie Supp. 1995); WASH. REV. CODE ANN. § 9A.44.130(4) (West Supp. 1995); W. VA. CODE § 61-8F-3 (Supp. 1995); WIS. STAT. ANN. § 175.45(4) (West Supp. 1994); WYO. STAT. § 7-19-302(c) (Supp. 1995).

26. *See, e.g.*, ALASKA STAT. § 12.63.020 (Supp. 1994) (15 years for single sexual offense and life for two or more sexual offense convictions); ARK. CODE ANN. § 12-12-906 (Michie Supp. 1993) (10 years); IDAHO CODE § 18-8305 (Supp. 1995) (10 years); ILL. ANN. STAT. ch. 730, para. 150/7 (Smith-Hurd Supp. 1995) (10 years); IND. CODE ANN. § 5-2-12-13 (West Supp. 1995) (duty to register terminates when individual is discharged from parole or probation); KAN. STAT. ANN. § 22-4906 (Supp. 1994) (10 years for single conviction and life upon second conviction); LA. REV. STAT. ANN. § 15:544.A (West Supp. 1995) (10 years); ME. REV. STAT. ANN. tit. 34-A, § 11003.1 (West Supp. 1994) (15 years); MINN. STAT. ANN. § 243.166.6 (West



individual who is statutorily required to register may be relieved of the duty.<sup>27</sup> In addition, most registration statutes prohibit the public disclosure of registrant information, although a few states permit public disclosure in limited circumstances.<sup>28</sup> Finally, many registration statutes apply

Supp. 1995) (10 years); MONT. CODE ANN. § 46-23-506 (1993) (10 years); N.H. REV. STAT. ANN. § 632-A:16 (Supp. 1994) (10 years or life depending on crime of conviction); N.D. CENT. CODE § 12.1-32-15.6 (Supp. 1995) (10 years); OHIO REV. CODE ANN. § 2950.06 (Anderson 1994) (10 years); OKLA. STAT. ANN. tit. 57, § 583.C (West 1991) (10 years); R.I. GEN. LAWS § 11-37-16(d)(3)(A) (1994) (duty to register terminates at age 25 for juvenile convicts); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1.9 (West Supp. 1995) (duty to register terminates on sexual offender's twenty-first birthday or when discharged from parole or probation); VA. CODE ANN. § 19.2-298.2 (Michie Supp. 1995) (15 years); WASH. REV. CODE ANN. § 9A.44.140(1) (West Supp. 1995) (10 to 15 years); W. VA. CODE § 61-8F-4 (Supp. 1995) (10 years); WIS. STAT. ANN. § 175.45(5) (West Supp. 1994) (15 years); WYO. STAT. § 7-19-304(a)(ii) (Supp. 1995) (10 years).

27. See, e.g., ARK. CODE ANN. § 12-12-908 (Michie Supp. 1993) (registrant may apply to state circuit court for order for relief from duty to register); CAL. PENAL CODE § 290.5 (West 1988) (registrant may initiate proceeding for certificate of rehabilitation for relief from further duty to register); COLO. REV. STAT. § 18-3-412.5(7) (Supp. 1994) (registrant may petition district court for order to discontinue registration requirement); IDAHO CODE § 18-8310 (Supp. 1995) (registrant may petition county district court for order to expunge registration information); KAN. STAT. ANN. § 22-4908 (Supp. 1994) (registrant may apply to county court for order relieving him or her of duty to register); LA. REV. STAT. ANN. § 15:544.B (West Supp. 1995) (registrant may petition court for relief from duty to register); ME. REV. STAT. ANN. tit. 34-A, § 11003.4 (West Supp. 1994) (sex offender may petition superior court to waive registration requirement); NEV. REV. STAT. ANN. § 207.156 (Michie 1992) (registrant may apply to district court for order relieving him of registration duty); N.J. STAT. ANN. § 2C:7-2.f (West 1995) (registrant may apply to state Superior Court to terminate obligation to register upon proof registrant has not committed an offense within 15 years following release and does not pose threat to others' safety); R.I. GEN. LAWS § 11-37-16(k) (1994) (registrant may petition for expungement of records and for relief from duty to register); TENN. CODE ANN. § 40-39-107 (Supp. 1995) (registrant may petition county circuit court for order relieving him of duty to submit registration/monitoring forms to state bureau of investigation); VA. CODE ANN. § 19.2-298.3 (Michie Supp. 1995) (registrant may petition circuit court for removal of registrant information from state Sex Offender Registry); WASH. REV. CODE ANN. § 9A.44.140(2)-(3) (West Supp. 1995) (registrant may petition superior court for relief from registration duty); WIS. STAT. ANN. § 175.45(7)(c) (West Supp. 1994) (registrant may request state department of justice expunge registration information on grounds that his or her conviction, delinquency adjudication, finding of need of protection or services, or commitment was reversed, set aside or vacated); WYO. STAT. § 7-19-304(b) (Supp. 1995) (registrant may petition district court to be relieved of duty to register).

28. For states that prohibit public inspection of registration information, see ALA. CODE § 13A-11-202 (1994); ARIZ. REV. STAT. ANN. § 13-3823 (1989); ARK. CODE ANN. § 12-12-909 (Michie Supp. 1993); CAL. PENAL CODE §§ 290(i), 290.4(f) (West Supp. 1995); COLO. REV. STAT. § 18-3-412.5(6) (Supp. 1994); DEL. CODE ANN. tit. 11, § 4120(i) (Supp. 1994); ILL. ANN. STAT. ch. 730, para. 150/9 (Smith-Hurd Supp. 1995); KY. REV. STAT. ANN. § 17.510(11) (Michie/Bobbs-Merrill Supp. 1994); MINN. STAT. ANN. § 243.166(7) (West 1992); N.H. REV. STAT. ANN. § 632-A:17 (Supp. 1994); OHIO REV. CODE ANN. § 2950.08 (Anderson 1994); OKLA. STAT. ANN. tit. 57, § 584.C (West Supp. 1995); R.I. GEN. LAWS § 11-37-16(i) (1994); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1.5(a) (West Supp. 1995); UTAH CODE ANN. § 77-27-21.5(11) (1995); W. VA. CODE § 61-8F-5 (Supp. 1995).

to individuals who were incarcerated at the time of the statute's enactment, as well as to individuals who may be imprisoned and released at some future time.<sup>29</sup>

At first glance, registration statutes appear to violate the constitutional prohibition against ex post facto laws.<sup>30</sup> The Ex Post Facto Clause

---

For states that permit limited disclosure of registrant information to state agencies employing individuals who work with children or provide services to children, see DEL. CODE ANN. tit. 11, § 4120(i) (Supp. 1994); IND. CODE ANN. § 5-2-12-11 (West Supp. 1995); NEV. REV. STAT. ANN. § 207.155.2 (Michie Supp. 1993); VA. CODE ANN. § 19.2-390.1B (Michie Supp. 1995); WYO. STAT. §§ 7-19-106(a), -303(b) (Supp. 1995). For a listing of statutes that permit the disclosure of registrant information to the public, see *infra* note 77.

29. See, e.g., ALASKA STAT. § 12.63.100(2) (Supp. 1994) (defining "sex offender" to include those convicted of sex offenses before, on, or after August 10, 1994); CAL. PENAL CODE § 290(a) (West 1988 & Supp. 1995) (imposing duty to register on those who, since July 1, 1944, have been or are thereafter convicted of certain sex offenses); COLO. REV. STAT. § 18-3-412.5(1)-(2) (Supp. 1994) (requiring individuals convicted of certain offenses on and after July 1, 1994 and individuals paroled on and after July 1, 1994 to register); DEL. CODE ANN. tit. 11, § 4120(a) (Supp. 1994) (mandating registration requirement on those "hereafter convicted . . . of any sexual offense" and on those paroled after serving sentences for sex crime convictions); IDAHO CODE § 18-8303 (Supp. 1995) (imposing duty to register on those convicted of certain offenses on or after July 1, 1993, and on individuals found guilty of certain crimes before July 1, 1993 and who are currently incarcerated or on probation); IND. CODE ANN. §§ 5-2-12-4, -12-5 (West Supp. 1995) (requiring registration of those on probation or parole for certain sexual offenses); KY. REV. STAT. ANN. §§ 17.510(2)-(4) (Michie/Bobbs-Merrill Supp. 1994) (imposing duty to register on individuals convicted of sex crimes who are paroled from prison after January 1, 1995 and on persons convicted of sex crimes after January 1, 1995); LA. REV. STAT. ANN. § 15:542.A (West Supp. 1995) (mandating registration for any adult residing in Louisiana who has pled guilty or been convicted of any sex offense); MINN. STAT. ANN. § 243.166.1 (West Supp. 1995) (imposing duty to register on those convicted of certain offenses); MONT. CODE ANN. §§ 46-23-502, -504 (1993) (requiring individuals convicted of sexual offenses to register); NEV. REV. STAT. ANN. §§ 207.151-152 (Michie 1992 & Supp. 1993) (defining "sex offender" to include those who, after July 1, 1956, had been or are convicted of certain sexual offenses); N.H. REV. STAT. ANN. §§ 632-A:11(III), -A:12 (Supp. 1994) (imposing duty to register on sex offenders regardless of date of conviction); TENN. CODE ANN. §§ 40-39-102(2), -103 (Supp. 1995) (requiring registration of individuals convicted of sexual offenses after January 1, 1995; individuals placed on probation after January 1, 1995 for sex crime convictions decreed before that date; and individuals discharged from incarceration on and after January 1, 1995). *But see* ILL. ANN. STAT. ch. 730, para. 150/2(A), 150/3 (Smith-Hurd Supp. 1995) (defining "child sex offenders" as those convicted of certain sex offenses after July 1, 1986); OKLA. STAT. ANN. tit. 57, § 582 (West Supp. 1995) (imposing duty to register on those convicted of certain offenses after November 1, 1989); R.I. GEN. LAWS § 11-37-16(a) (1994) (imposing duty to register on those who, since July 1, 1992, have been or are thereafter convicted of certain offenses).

30. See U.S. CONST. art. I, § 10, cl. 1 (stating that "[n]o State shall . . . pass any . . . ex post facto Law"). In *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the United States Supreme Court interpreted the ex post facto provision to prohibit the following: (1) laws that make criminal an innocent act done before the passing of the law; (2) laws that aggravate a crime or that make it a greater crime than when it was committed; (3) laws that change the punishment and inflict greater punishment than was mandated when the crime was committed; and (4) laws that alter

of the United States Constitution forbids the states from enacting any law that increases the amount of punishment associated with a crime after the crime was committed.<sup>31</sup> Many courts, however, have upheld registration statutes against this constitutional challenge and have found that registration laws do not impose additional punishment upon a convicted offender.<sup>32</sup> Courts have reasoned that such statutes aid law enforce-

---

the legal rules of evidence in order to convict the offender. *Id.* at 390. After a period of judicial expansion of the four categories of prohibited laws, the *Calder* categories were re-established as the parameters for ex post facto law. *Collins v. Youngblood*, 497 U.S. 37, 47-52 (1990).

31. BLACK'S LAW DICTIONARY 580 (6th ed. 1990). More specifically, an ex post facto law is defined as "a law that changes the punishment or inflicts a greater punishment than the law annexed to the crime when it was committed." *Id.*

32. See, e.g., *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992); *State v. Costello*, 643 A.2d 531, 534 (N.H. 1994); *State v. Ward*, 869 P.2d 1062, 1066-68 (Wash. 1994). But see *Rowe v. Burton*, 884 F. Supp. 1372, 1380 (D. Alaska 1994) (concluding plaintiffs likely to succeed on claim that Registration Act violates prohibition on ex post facto laws because law allowed for public dissemination of information concerning sex offenders whose convictions antedated Registration Act); *In re Reed*, 663 P.2d 216, 222 (Cal. 1983) (invalidating state law requiring registration of only certain types of sex offenders as punitive).

The test for determining whether a statute violates the Ex Post Facto Clause involves ascertaining whether the law (1) punishes as a crime an act previously committed, which was not a crime when done; (2) makes the punishment for a crime more burdensome after its commission (is retrospective); or (3) deprives one charged with a crime of any defense available according to the law at the time the act was committed (it disadvantages the person affected by it). *Ward*, 869 P.2d at 1067-68. Moreover, the ex post facto prohibition applies only to laws that inflict criminal punishment. *Id.* at 1068 (citing *Johnson v. Morris*, 557 P.2d 1299, 1304 (Wash. 1976); *In re Young*, 857 P.2d 989, 999 (Wash. 1993)). To determine whether a law is punitive (criminal in nature) or regulatory (civil in nature), a court must first look to the legislature's purpose in enacting the law. *Id.* at 1069. Even if the stated purpose is regulatory, a court must examine whether the effect of the statute is "so punitive as to negate the legislature's regulatory intent." *Id.* (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). To determine whether the statute's effect is punitive, a court should employ the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Ward*, 869 P.2d at 1068 (citing *Mendoza-Martinez*, 372 U.S. at 168-69).

The *Mendoza-Martinez* factors focus attention on the statute's effects. *Id.* at 1068. The *Mendoza-Martinez* analysis first requires a court to decide whether the challenged statute involves an affirmative disability or restraint. *Mendoza-Martinez*, 372 U.S. at 168-69. Second, a court must consider whether the challenged statute's requirements historically have been regarded as punishment. *Id.* Third, a court must determine whether the statute is relevant only on a finding of scienter. *Id.* Fourth, a court must consider whether the statute's operation will "promote the traditional aims of punishment — retribution and deterrence." *Id.* (footnote omitted). Fifth, a court must examine whether the behavior to which the statute applies is in fact a crime. *Id.* Sixth, a court must consider whether it can assign any alternative purpose to which the statute may be rationally connected. *Id.* Seventh, a court must evaluate whether the statute appears excessive in relation to the alternative purpose assigned. *Id.* These factors will assist a court in determining whether the statute's effect is to impose punishment or whether the statute's effect is merely regulatory in nature. *Ward*, 869 P.2d at 1069. If a court finds the statute imposes additional punishment, then the statute violates the constitutional prohibition against ex post facto laws. *Id.* at 1068.

ment;<sup>33</sup> that the registration of sex offenders does not constitute punishment;<sup>34</sup> and that retroactive application of registration statutes is not ex post facto when no greater punishment is imposed.<sup>35</sup>

## 2. State Civil Commitment Statutes

State statutes that provide for the civil commitment and treatment of sexual offenders in lieu of punishment have existed since the 1940s.<sup>36</sup> These early statutes classified sex offenders among the mentally ill and provided for their commitment and treatment in a manner similar to that

---

33. See, e.g., *Noble*, 829 P.2d at 1223. In *Noble*, the Supreme Court of Arizona applied the *Mendoza-Martinez* factors to a state law that required sex offenders to register. *Id.* at 1221-24. After acknowledging that the statute had both punitive and regulatory effects, the court concluded that "on balance, requiring convicted sex offenders to register pursuant to [the statute] is not punishment" and therefore "retrospective application of the statute to these defendants does not violate the *ex post facto* clause of the United States or Arizona Constitution." *Id.* at 1224. The court emphasized that "as applied to child sex offenders, [the registration requirement] is not excessive in relation to its non-punitive, law enforcement purpose." *Id.*; see also *People v. Adams*, 581 N.E.2d 637, 640 (Ill. 1991) (noting that Habitual Child Sex Offender Registration Act was designed to aid law enforcement).

34. See, e.g., *Ward*, 869 P.2d at 1074. In *Ward*, the Supreme Court of Washington analyzed the state's registration statute under the *Mendoza-Martinez* factors to determine whether the statute's effect was punitive in nature. *Id.* at 1067-74. It concluded that "[o]n balance . . . the requirement to register as a sex offender under [the statute] does not constitute punishment" and thus the law did not violate the *ex post facto* prohibitions. *Id.* at 1074.

A similar result was reached in *State v. Douglas*, 586 N.E.2d 1096 (Ohio Ct. App. 1989), *appeal dismissed*, 550 N.E.2d 484 (Ohio 1990), where the appellant argued that the Ohio registration requirement for habitual sex offenders violated the cruel and unusual punishment prohibitions found in the United States and Ohio Constitutions. *Id.* at 1097. The Court of Appeals of Ohio disagreed and held that requiring the defendant to register violated neither the federal nor the state constitutions. *Id.* at 1099. The court described the registration requirement as a "modest burden" upon the defendant and explained that the information was for law enforcement purposes. *Id.* In addition, the court noted that the registration was "not a public record." *Id.*

35. See, e.g., *Costello*, 643 A.2d at 534. In *Costello*, the defendant argued that the state registration requirement was *ex post facto* because it applied to him retrospectively. *Id.* at 532. The Supreme Court of New Hampshire disagreed and held that "as the sexual offender registration requirement inflicts no greater punishment, no *ex post facto* violation occurs in the application of the law to the defendant." *Id.* at 534. The court reasoned that the law enforcement community held the registration information confidential and that facially, the statute did not purport to be punitive. *Id.* at 533; see also *State v. Taylor*, 835 P.2d 245, 247-49 (Wash. Ct. App. 1992) (holding that retrospective application of registration requirement did not disadvantage defendant to extent it constituted additional punishment violative of *ex post facto* prohibition), *review denied*, 877 P.2d 695 (Wash. 1994).

36. See Carol Veneziano & Louis Veneziano, *An Analysis of Legal Trends in the Disposition of Sex Crimes: Implications for Theory, Research, and Policy*, 15 J. PSYCHIATRY & L. 205, 206-07 (1987) (noting that until research is done on impact of legislation in this area, legislative policies are not likely to be effective).

accorded mentally ill patients.<sup>37</sup> Many of these statutes, however, were repealed in the 1970s as attention shifted from providing treatment to sexual offenders to punishing them.<sup>38</sup> Today, the trend is toward enacting statutes that permit the civil commitment of released sex offenders after they have already served their criminal sentences.<sup>39</sup>

The State of Washington has enacted one of the more controversial civil commitment statutes, entitled Sexually Violent Predators,<sup>40</sup> that only

37. See, e.g., CAL. WELF. & INST. CODE §§ 6300-6330 (West 1984), *repealed by* 1981 Cal. Stat. ch. 928, § 2, at 3485; Act of Apr. 2, 1953, ch. 186, 1953 Kan. Sess. Laws 334 (repealed 1970); Act of April 21, 1939, ch. 369, 1939 Minn. Laws 712 (codified at MINN. STAT. ANN. § 26.09-10) (repealed 1994).

38. Veneziano & Veneziano, *supra* note 36, at 216-17; see also Beth Keiko Fujimoto, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 879-81 (1992) (discussing state trend to repeal involuntary civil commitment laws that emphasized treatment of sex offenders through commitment procedures). For states that provide for the civil commitment of sexual offenders in lieu of incarceration, see COLO. REV. STAT. §§ 16-13-201 to -216 (1986 & Supp. 1994) (granting district courts authority to, in lieu of sentence, commit sexual offenders to custody of department of corrections for indeterminate term); CONN. GEN. STAT. ANN. §§ 17a-561 to -572 (West 1993); D.C. CODE ANN. §§ 22-3503 to -3511 (1989) (providing for civil commitment of persons determined to be sexual psychopaths and permitting stay of any pending criminal proceedings); ILL. ANN. STAT. ch. 725, para. 205 (Smith-Hurd 1992 & Supp. 1995) (codifying Illinois Sexually Dangerous Persons Act that provides for commitment of sexually dangerous offenders); MASS. GEN. LAWS ANN. ch. 123A, §§ 1-11 (West 1986 & Supp. 1995) (providing for treatment and rehabilitation of sexually dangerous persons, and for serving of sex crime conviction sentence concurrently with commitment for treatment); MINN. STAT. ANN. §§ 526.09-11 (West Supp. 1994); NEB. REV. STAT. §§ 29-2922 to -2936 (Supp. 1994) (allowing for commitment and treatment of convicted sex offenders); OR. REV. STAT. §§ 426.510-680 (1993) (providing for commitment and treatment of sexually dangerous persons); TENN. CODE ANN. §§ 33-6-301 to -306 (1984 & Supp. 1995) (authorizing commitment of sex offenders determined to be dangerous because of mental illness and permitting civil commitment for first-time non-violent sex offenders who plead guilty); UTAH CODE ANN. §§ 77-16-1 to -5 (1995) (providing that medical examiners give mental examinations to individuals convicted of sex crimes and correspondingly allowing for hospitalization); VA. CODE ANN. §§ 19.2-300 to -302 (Michie 1995) (allowing sentence deferral for persons convicted of sex crimes); WASH. REV. CODE ANN. §§ 71.09.010-09.902 (West 1992 & Supp. 1995) (permitting civil commitment of released offenders); WIS. STAT. §§ 975.01(2), .06 (1985 & Supp. 1994) (providing that persons convicted of certain sex offenses be committed to state department of health and social services for treatment).

39. See, e.g., WASH. REV. CODE ANN. §§ 71.09.010-902 (West 1992 & Supp. 1995) (entitling statute "Sexually Violent Predators" and establishing procedures for civil commitment of released sex offenders). For a further discussion of the Washington statute, see *infra* notes 40-45 and accompanying text.

40. See WASH. REV. CODE ANN. §§ 71.09.010-120 (West 1992 & Supp. 1995). Washington's statute is controversial because it authorizes the civil commitment of certain sexual offenders for an indefinite period of time so as to prevent the offender's reentry into the community after having served a sentence in which attempts at rehabilitation have failed. *Id.* For a general discussion of Washington's power to commit sexual predators, see Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 107-10 (1990) (suggesting that

a few states have followed.<sup>41</sup> The Sexually Violent Predators statute is part of the state's Community Protection Act of 1990,<sup>42</sup> which Washington lawmakers enacted in response to citizen concern that state laws treated violent sex offenders too leniently.<sup>43</sup> The Sexually Violent Predators statute authorizes the involuntary civil commitment of a criminal sex offender who has served his or her sentence if a state psychiatric board has determined that the individual is a "sexually violent predator."<sup>44</sup> The statute

---

commitment power is based on combination of state police power and *parens patriae* power, thus protecting society as well as offender).

41. See, e.g., KAN. STAT. ANN. § 59-2901 (1994) (providing for civil commitment of sexually violent predators); MINN. STAT. ANN. § 253B.185 (West 1992 & Supp. 1995) (authorizing civil commitment of sexually dangerous or sexually psychopathic persons); N.J. STAT. ANN. § 2C:47 (West 1995) (providing for involuntary civil commitment of dangerous sexual offenders).

42. See Community Protection Act, ch. 3, §§ 101-1406, 1990 Wash. Laws 12 (1990) (codified as amended in scattered sections of WASH. REV. CODE). Washington's sexual predator laws include provisions for the civil commitment of certain sexual offenders. WASH. REV. CODE ANN. § 71.09 (West 1992 & Supp. 1995). For a discussion of the civil commitment provisions, see *infra* notes 44-45 and accompanying text.

43. See Fujimoto, *supra* note 38, at 880-83. (discussing history behind enactment of Washington's sex offender involuntary commitment statute). The Washington state legislature enacted the Sexually Violent Predators statute because of the public outrage following a 1989 attack on a seven-year-old boy in the state by a repeat offender, Earl Shriner. Jacobs, *supra* note 2, at A11. For a discussion of some of the factors that led to the enactment of the statute, see *supra* note 2. A Washington court had committed Shriner to the state Department of Institutions as a "defective delinquent" as punishment for killing a teenage girl whose body Shriner led the police to in 1966. *Id.* Psychiatrists at Eastern State Hospital stated in 1966 that Shriner was too dangerous to be at large. *Id.*

Shriner was convicted of subsequent sexual crimes in 1977. *Id.* at 526-27. He was convicted of the kidnapping and second degree assault of two teenage girls and was later sentenced to two consecutive 10-year terms. *In re Shriner*, 627 P.2d 99, 99-100 (Wash. 1981). In 1978, he was determined not to be amenable to psychological treatment and an order suspending his sentence was revoked. *Id.* at 99. Therefore, the Washington State Supreme Court ordered the Board of Prison Terms and Paroles to reset Shriner's sentencing to run concurrently. *Id.* at 101.

After Shriner's release from prison, officials were unable to commit Shriner as mentally ill under the state's civil commitment laws because he exhibited no recent overt acts of dangerousness. Boerner, *supra* note 2, at 527. As a result, following his release in 1987, Shriner committed further assaults on children. *Id.* at 528. For these crimes, he served less than 250 days in jail. *Id.*

The community was outraged after Shriner mutilated the seven-year-old boy in 1989 due not only to the barbaric nature of the crime, but also to the press' subsequent publication of Shriner's criminal history. See *id.* at 529-32. This response contributed to the establishment of a Task Force charged with examining the manner in which the state's criminal system treated offenders who did not qualify for civil commitment but who presented a danger to the community. *Id.* at 538. The Task Force's determinations led to the enactment of the state's civil commitment statute. *Id.* at 562-75. For a further discussion of Washington's Sexually Violent Predators statute, see *infra* notes 44-49 and accompanying text.

44. WASH. REV. CODE ANN. § 71.09.010 (West 1992 & Supp. 1995). The statute defines a "sexually violent predator" as a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality

also provides for various procedural safeguards to ensure that the civil commitment of an offender complies with the constitutional requirements of due process.<sup>45</sup>

State commitment statutes that authorize the indefinite commitment of sexual predators for treatment purposes will undoubtedly face future constitutional challenges given their novelty.<sup>46</sup> Washington's civil commitment statute was challenged on constitutional grounds in the case of *Young v. Weston*.<sup>47</sup> In *Young*, the petitioner was involuntarily committed under the Sexually Violent Predators statute after having served a sentence

---

or personality disorder which makes the person likely to engage in predatory acts of sexual violence." *Id.* § 71.09.020(1).

45. *Id.* § 71.09.080. Under the statute, when a convicted offender's sentence for a sexually violent offense is about to expire or has expired, the state may file a petition alleging that the person is a sexually violent predator. *Id.* § 71.09.030. A judge must then determine *ex parte* if "probable cause exists to believe that the person . . . is a sexually violent predator." *Id.* § 71.09.040. If probable cause is found, the individual is placed in custody and transferred to a facility for evaluation. *Id.*

Within 45 days, the court must conduct a trial to determine if the person is a sexually violent predator. *Id.* § 71.09.050. The alleged predator has a statutory right to counsel and may be examined by an expert of his or her choice. *Id.* The state bears the burden of proving beyond a reasonable doubt that the person is a sexually violent predator. *Id.* § 71.09.060(1). If the state carries its burden, the detainee shall be committed to a facility for control, care and treatment until the detainee is "safe to be at large." *Id.* Treatment centers are limited to mental health facilities located within correctional institutions. *Id.* § 71.09.060(3), § 10.77.220.

Annual examinations must be made of the detainee to determine his or her mental condition and the results must be provided to the trial court. *Id.* § 71.09.070. The detainee may obtain an additional examination at state expense. *Id.* If it is determined that the detainee is no longer a sexually violent predator, the Secretary of the Department of Social and Health Services shall authorize the detainee to petition the court for release. *Id.* § 71.09.090(1). Upon this filing, the court shall order a hearing within 45 days. *Id.* Either party may demand a jury and the state bears the burden of proving beyond a reasonable doubt that the detainee is not safe for release at large. *Id.*

The detainee may petition the court without the Secretary's approval. *Id.* § 71.09.090(2). If the detainee does not affirmatively waive his or her annual right to petition, then upon the filing of such a petition, a hearing to show cause is held. *Id.* If the court finds probable cause exists to believe that the detainee is no longer dangerous, then a full hearing is held. *Id.* The court will not hold additional hearings unless the detainee can show a change of condition. *Id.* § 71.09.100. For a critical analysis of evidentiary issues in sexual predator prosecutions, see Robert C. Boruchowitz, *Sexual Predator Law — The Nightmare in the Halls of Justice*, 15 U. PUGET SOUND L. REV. 827, 832-42 (1992) (proposing that psychological speculations regarding mental abnormality be subject to same evidentiary standard as blood and breath machines).

46. See, e.g., *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). The United States District Court for the Western District of Washington held the state's Sexually Violent Predators statute unconstitutional. See *id.* The Supreme Court of Washington, however, had upheld the constitutionality of the law. *In re Young*, 857 P.2d 989, 1018 (Wash. 1993). For a further discussion of *Young v. Weston*, see *infra* notes 47-51 and accompanying text.

47. 898 F. Supp. 744 (W.D. Wash. 1995).

for a rape conviction.<sup>48</sup> He challenged his commitment as an unconstitutional preventive detention and argued that the statute was substantively and procedurally deficient.<sup>49</sup> The United States District Court for the Western District of Washington agreed with the petitioner, holding that the statute was unconstitutional on its face.<sup>50</sup> The court reasoned that the statute violated the substantive protections of the Due Process Clause and that it violated the Ex Post Facto Clause and the Double Jeopardy Clause of the United States Constitution.<sup>51</sup>

Prior to *Young*, however, constitutional challenges brought against civil commitment statutes have generally been unsuccessful for two reasons.<sup>52</sup> First, courts have widely recognized that the states may enact civil

48. *Id.* at 748. Andre Brigham Young was convicted of rape on three occasions over a period of 22 years. *Id.* In October 1990, one day prior to his scheduled release from prison on a 1985 conviction, the State filed a petition under the Sexually Violent Predators statute to commit Young. *Id.* Young was transferred to the state's Special Commitment Center and held until his trial in February 1991. *Id.* The jury concluded that Young was a sexually violent predator and, as a result, he was committed. *Id.* On direct appeal from the trial court, the Washington Supreme Court held the statute was constitutional. *Young*, 857 P.2d at 1018.

49. *Young*, 898 F. Supp. at 748. The petitioner asserted that the Sexually Violent Predators statute, specifically § 71.09, violated the substantive due process component of the Fourteenth Amendment, the Ex Post Facto Clause of Article I and the Double Jeopardy Clause of the Fifth Amendment. *Id.*

50. *Id.* at 746.

51. *Id.* at 754. First, the court held that the statute violated the substantive protections of the Due Process Clause of the Fourteenth Amendment because the statute allowed the indefinite confinement of persons who are not mentally ill. *Id.* at 751. The court reasoned that predictions of dangerousness alone were an insufficient basis to indefinitely incarcerate an offender who has completed his prison term. *Id.* Second, the court held that the statute violated the Ex Post Facto Clause because as to the petitioner, it operated retrospectively and disadvantaged the petitioner. *Id.* at 753. Third, the court held that the statute violated the Double Jeopardy Clause because the statute served the traditional aims of punishment—retribution and deterrence. *Id.* at 753-54. The court stated that “[h]aving once been punished for the commission of a violent sexual offense, the offender is subject to further incarceration under the Statute’s commitment scheme.” *Id.* at 754. The court, therefore, concluded that the “punishment imperative” embodied in the statute rendered the statute an unconstitutional second punishment. *Id.* For a critique of Washington State’s Sexually Violent Predators statute, see Erin Gunn, *Washington’s Sexually Violent Predator Law: The “Predatory” Requirement*, 5 UCLA WOMEN’S L.J. 277, 281-83 (1994) (arguing Sexually Violent Predators law constitutes criminal statute that unconstitutionally permits preventive detention).

52. See, e.g., *Addington v. Texas*, 441 U.S. 418, 432 (1979). In *Addington*, the Supreme Court addressed the standard of proof required in a civil commitment proceeding to involuntarily commit an individual for an indefinite period of time to a state mental hospital. *Id.* at 419-20. The Court reasoned that “the standard has to inform the factfinder that the proof must be greater than the preponderance of the evidence standard applicable to other categories of civil cases.” *Id.* at 432-33. It held, therefore, that the trial court’s standard of “clear, unequivocal and convincing” evidence was constitutionally adequate. *Id.* at 433; see also *In re D.C.*, 656 A.2d 861, 868-70 (N.J. Super. App. Div. 1995) (noting New Jersey’s involuntary civil commitment procedures protect fundamental liberty interests and ensure due process of law and holding that offender could not be involuntarily committed where Attorney General failed to follow statutory civil commitment procedures); *In*



commitment laws to care for and protect mentally ill citizens.<sup>53</sup> Second, courts have allowed the states to enact laws to protect their citizens from the dangerous tendencies of those who are mentally ill.<sup>54</sup>

Moreover, the United States Supreme Court examined the constitutionality of state civil commitment statutes in *Allen v. Illinois*<sup>55</sup> and *Foucha v. Louisiana*.<sup>56</sup> In both cases, the Court indicated that the commitment of dangerous persons is constitutionally permissible when the commitment statute is essentially civil in nature.<sup>57</sup>

For example, in *Allen*, the Court concluded that proceedings under the Illinois Sexually Dangerous Persons Act were not criminal in nature and therefore upheld the detainee's preventive detention.<sup>58</sup> The petitioner in *Allen* challenged the Illinois Supreme Court's decision to reinstate the trial court's finding that the petitioner was a sexually dangerous person.<sup>59</sup> Specifically, the petitioner asserted that the trial court had violated his Fifth Amendment right against self-incrimination by permitting

---

*re Irwin*, 529 N.W.2d 366, 376 (Minn. Ct. App. 1995) (affirming appellant's commitment to state hospital as mentally ill, dangerous and psychopathic personality under state civil commitment statute in face of Confrontation Clause challenge).

53. *Allen v. Illinois*, 478 U.S. 364, 373 (1986) (stating that fact that psychiatric center housed criminals in addition to sexually dangerous persons does not transform states' intent to treat into intent to punish); *Addington*, 441 U.S. at 426 (holding that states can act under their *parens patriae* authority on behalf of mentally ill for their own protection and treatment); *Rogers v. Okin*, 738 F.2d 1, 6 (1st Cir. 1984) (recognizing state's *parens patriae* power to treat mentally ill patients against their will when necessary).

54. *Addington*, 441 U.S. at 426. A state may enact legislation under its police powers to protect citizens from the dangerous conduct of those who are mentally ill. *Id.*; see also *Jones v. United States*, 463 U.S. 354, 368 (1983) (holding that insanity acquittee could be committed under state civil commitment statute but can be held only so long as individual is both mentally ill and dangerous).

55. 478 U.S. 364 (1986).

56. 504 U.S. 71 (1992). For a discussion of *Foucha*, see *infra* notes 68-74 and accompanying text.

57. *Foucha*, 504 U.S. at 86 (invalidating state statute which lacked requirement that state prove basis of confinement by clear and convincing evidence); *Allen*, 478 U.S. at 370 (noting (1) State's disavowal of any interest in punishment; (2) provision for treatment of detainees; (3) establishment of system under which detainees can be released after briefest commitment period; and therefore, upholding detainee's commitment).

58. *Allen*, 478 U.S. at 375. The Court noted that the Illinois statute provided for civil commitment in lieu of criminal punishment and therefore determined that the statute served the purposes of treatment, not punishment. *Id.* at 373. Moreover, the Act did "not appear to promote either of 'the traditional aims of punishment — retribution and deterrence.'" *Id.* at 370 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)). For the text of the Illinois Sexually Dangerous Persons Act, see ILL. ANN. STAT. ch. 725, para. 205 (Smith-Hurd 1992 & Supp. 1995).

59. *Allen*, 478 U.S. at 367-68. The Illinois Supreme Court reinstated the trial court's finding of dangerousness, stating that there was "sufficient evidence to establish defendant's sexually dangerous status beyond a reasonable doubt." *People v. Allen*, 481 N.E.2d 690, 698 (Ill. 1985).

two psychiatrists to testify at trial after having interviewed him.<sup>60</sup> The United States Supreme Court stated that the defendant must provide "the clearest proof" that a statute is so punitive, either in purpose or effect, as to negate the state's intent that the proceedings be civil.<sup>61</sup> The Court dismissed the petitioner's allegations and held that the proceedings under the statute were essentially civil in nature, and thus the constitutional protection against self-incrimination was not implicated.<sup>62</sup>

In arriving at this conclusion, the Court considered four factors as indicative of the civil nature of proceedings under the Illinois Sexually Dangerous Persons Act.<sup>63</sup> First, the Court examined whether the commitment statute required a finding of a potential detainee's mental illness.<sup>64</sup> Second, the Court evaluated whether the statute reflected a legislative intent that was not punitive in nature.<sup>65</sup> Third, the Court considered whether the statute provided for the treatment of detainees who were ad-

---

60. *Allen*, 478 U.S. at 366-70. The trial court had ordered the petitioner to submit to two psychiatric examinations to assist the court in determining whether the petitioner was a sexually dangerous person. *Id.* at 366. At a bench trial on the State's petition to declare the petitioner a sexually dangerous person, the State presented the testimony of the two psychiatrists who had interviewed the petitioner. *Id.* The petitioner objected to admission of the testimony and argued that the psychiatrists had elicited information from him in violation of his privilege against self-incrimination. *Id.* The trial court allowed each psychiatrist to give his opinion but ruled that the petitioner's statements themselves were not admissible. *Id.* The Illinois Supreme Court reinstated the trial court's finding of dangerousness and held that the privilege against self-incrimination was unavailable in sexually-dangerous person proceedings because such proceedings were civil in nature. *Id.* at 367.

61. *Id.* at 369.

62. *Id.* at 375. The Court concluded that the proceedings were not criminal within the meaning of the Fifth Amendment. *Id.* at 374. The Court stated that it was "unpersuaded by petitioner's efforts to challenge [the] conclusion" of the Illinois Supreme Court, which had reviewed the Act and its own caselaw and concluded that the proceedings were essentially civil in nature. *Id.* at 369. The Court reasoned that the fact a person is adjudged sexually dangerous under the Act and is committed to an institution that houses convicts who require psychiatric care does not make the conditions of confinement amount to punishment and thus render the commitment proceedings criminal. *Id.* at 372. In addition, the Court noted that the Illinois legislature expressly provided that proceedings under the Act were to be civil in nature. *Id.* at 368.

63. *See id.* at 369-71.

64. *Id.* at 370-71. The Court concluded that the Illinois statute met this requirement because the Illinois Supreme Court "has construed the Act to require proof of the existence of a mental disorder for more than one year and a propensity to commit sexual assaults, in addition to demonstration of that propensity through sexual assault." *Id.*

65. *Id.* at 368. The Court concluded that the Illinois statute was not punitive because Illinois "expressly provided that proceedings under the Act 'shall be civil in nature,' indicating that when [the state] files a petition against a person under the Act it intends to proceed in a nonpunitive, noncriminal manner, 'without regard to the procedural protections and restrictions available in criminal prosecutions.'" *Id.* (citation omitted) (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)).

judged to be sexually dangerous.<sup>66</sup> Finally, the Court noted whether the statute set forth procedures for the release of a detainee after the briefest period of confinement.<sup>67</sup>

In keeping with the reasoning in *Allen*, the United States Supreme Court invalidated a Louisiana civil commitment statute in *Foucha v. Louisiana*<sup>68</sup> because the statute failed to require a finding of a detainee's mental illness.<sup>69</sup> The trial court in *Foucha* found the petitioner Foucha not guilty by reason of insanity on burglary charges.<sup>70</sup> After spending four years in a mental institution, a panel at the institution reported that Foucha showed no signs of mental illness and recommended his conditional discharge.<sup>71</sup> However, one doctor testified at Foucha's commitment hearing that Foucha suffered from an antisocial personality and testified that he would not be comfortable certifying that Foucha would not be a danger upon release.<sup>72</sup> The trial court concluded that Foucha was a danger to himself and others and ordered that he be returned to the mental institution.<sup>73</sup> On appeal, the Supreme Court invalidated the statute under which Foucha was committed on the grounds that it failed to require a finding that Foucha was mentally ill.<sup>74</sup>

---

66. *Id.* at 369. The Court noted that Illinois met this requirement because "[u]nder the Act, the State has a statutory obligation to provide 'care and treatment for [persons adjudged sexually dangerous] designed to effect recovery.'" *Id.*

67. *Id.* at 369-70. The Court found that this factor was met in the Illinois statute because "[i]n short, the State has disavowed any interest in punishment, provided for the treatment of those it commits and established a system under which committed persons may be released after the briefest time in confinement." *Id.* at 370. Also, a detainee could apply for release at any time. *Id.* at 369.

68. 504 U.S. 71 (1992).

69. *Id.* at 77, 85-86. The Court held that absent a showing that Foucha was mentally ill, it was impermissible for the State to confine Foucha based solely on the State's determination that Foucha was dangerous. *Id.* at 80, 85-86.

70. *Id.* at 74. The State charged Foucha with aggravated burglary and the illegal discharge of a firearm. *Id.* at 73. Initially, the trial court found that Foucha lacked the mental capacity to proceed. *Id.* Four months later, Foucha was found competent to stand trial and was found not guilty by reason of insanity. *Id.* at 74.

71. *Id.* at 74. Foucha was committed to the East Feliciana Forensic Facility "until such time as doctors recommended that he be released." *Id.* Approximately four years later, the Feliciana superintendent recommended that Foucha be discharged or released. *Id.* Thereafter, a three member panel recommended Foucha be conditionally discharged. *Id.*

72. *Id.* at 75. The doctor testified that Foucha evidenced no signs of psychosis or neurosis and was in "good shape" mentally. *Id.* However, the doctor stated that Foucha had an antisocial personality, "a condition that is not a mental disease and that is untreatable." *Id.*

73. *Id.* The appellate court refused supervisory writs and the Louisiana Supreme Court affirmed, holding that "Foucha had not carried the burden placed upon him by the statute to prove that he was not dangerous." *Id.*

74. *Id.* at 80. The statute's failing was that it did not require a finding of a detainee's mental illness *in addition to* a finding of dangerousness. *Id.* The Court held that in civil commitment proceedings, "the State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane

If a state commitment statute provides sufficient indicia of the civil nature of the commitment proceedings, then it may be upheld as constitutionally sound.<sup>75</sup> On the other hand, if a statute seeks to commit a sex offender after his or her release from incarceration based on a mere prediction of future dangerousness, the statute will very likely be held unconstitutional.<sup>76</sup>

### 3. *State Community Notification Statutes*

State community notification statutes permit local law enforcement authorities to notify citizens when a convicted sex offender moves into their neighborhood.<sup>77</sup> Thus, once a released offender registers with local law enforcement officials, the officials can disseminate registrant informa-

---

convict beyond his criminal sentence, when the basis for his original confinement no longer exists." *Id.* at 86.

The problem with the Illinois statute was that Foucha bore the burden of proving that he was not a danger to the community. *Id.* at 82. He was not afforded a hearing at which the state was required to prove his dangerousness. *Id.* at 81. The Court held, therefore, that the statute violated due process. *Id.* at 86.

75. See, e.g., *Allen v. Illinois*, 478 U.S. 364, 375 (1986) (holding that proceedings under Illinois Sexually Dangerous Persons Act not to be criminal within meaning of Fifth Amendment's guarantee against compulsory self-incrimination). For a further discussion of *Allen*, see *supra* notes 58-67 and accompanying text.

76. See, e.g., *Young v. Weston*, 898 F. Supp. 744, 751 (W.D. Wash. 1995). The district court held Washington's Sexually Violent Predators statute to be unconstitutional, noting that, like the commitment scheme invalidated in *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Washington statute "permits indefinite incarceration based on little more than a showing of potential future dangerousness." *Young*, 898 F. Supp. at 749.

77. See, e.g., ALASKA STAT. § 18.65.087(b) (1994) (providing that registration information is confidential except as to sex offender's name; address; photograph; place of employment; date of birth; crime of conviction; date, court, and place of conviction; and length of sentence); IDAHO CODE § 9-340(11)(f)(ii) (Supp. 1995) (allowing for dissemination of information upon written request); LA. REV. STAT. ANN. § 15:546A (West Supp. 1995) (authorizing criminal justice agencies to release relevant information regarding sex offenders to public); ME. REV. STAT. ANN. tit. 34A, § 11004 (West Supp. 1994) (permitting disclosure of one's status as registered sexual offender upon written request pursuant to state Criminal History Record Information Act); N.J. STAT. ANN. § 2C:7-5 to -11 (West 1995) (requiring that notice be given to community residents depending on risk of re-offense presented by released offender); N.D. CENT. CODE § 12.1-32-15.8 (Supp. 1995) (permitting inspection of registrant information by public); OR. REV. STAT. § 181.508(2)(c) (Supp. 1994) (permitting disclosure to residential neighbors and churches, community parks, schools, businesses, and other places that children or other potential victims may frequent); TENN. CODE ANN. § 40-39-106(c) (Supp. 1995) (allowing local law enforcement agencies to release sex offender registrant information if necessary to protect public); WASH. REV. CODE ANN. § 71.09.120 (West 1992 & Supp. 1995) (authorizing release of relevant information necessary to protect public); Act of April 7, 1994, 1994 Kan. Sess. Laws 107 (amending § 22-4909 to allow inspection of registration information by public); Registration of Sexual Offenders, Act No. 24 of Special Session 1995 — No. 1, 1995 Pa. Legis. Serv. (Purdon) (to be codified at 42 PA. CONS. STAT. § 9798). For lists of state statutes that permit the limited disclosure of registrant information and that prohibit public inspection of registration information, see *supra* note 28.

tion as they deem appropriate.<sup>78</sup> Notification laws serve a much different purpose than registration laws, which essentially provide a means of keeping track of released offenders.<sup>79</sup> The rationale behind notification laws is that notice to community residents is the best way to protect them, as citizens are forewarned that a sex offender is in their midst.<sup>80</sup> Although state community notification statutes are less typical than statutes that implement registration programs, notification laws are growing in popularity.<sup>81</sup>

Five states at the forefront of the movement to enact community notification laws include Washington, Louisiana, New Jersey, Tennessee and Alaska.<sup>82</sup> Washington's community notification statute was enacted in 1990 as part of a comprehensive package of legislation directed toward sexual offenders.<sup>83</sup> Louisiana followed Washington's lead by enacting its

78. See, e.g., TENN. CODE ANN. § 40-39-106(c) (Supp. 1995) (permitting release of registrant information by local law enforcement as necessary to protect public). For a list of state statutes that authorize the dissemination of information to the public, see *supra* note 77. For a discussion of the Federal Crime Bill provisions that give state law enforcement authorities discretion in the dissemination of registrant information, see *infra* notes 133-37 and accompanying text.

79. See, e.g., N.J. STAT. ANN. § 2C:7-1 (West 1995) (stating New Jersey Legislature's finding that danger of recidivism posed by sex offenders requires registration system that permits law enforcement officials to identify and alert public when necessary for public safety and that will provide information critical to preventing and resolving incidents involving sexual abuse and missing persons); Houston, *supra* note 24, at 733-34 (noting that registration laws may help law enforcement officials keep track of offenders to prevent re-offenses, may facilitate investigation once crime has occurred and may help prevent offender from repeating his or her crime by making offender admit his or her problem and by reinforcing seriousness of his or her crime).

80. Jill Porter, *Megan's Law Might Create False Security*, PHILA. DAILY NEWS, Jan. 6, 1995, at 12 (stating notification laws designed to make families aware of danger); see also Chapman, *supra* note 3, at 3 (indicating parental preventive measures may follow notification). But see Anderson, *supra* note 3, at 1 (noting no studies yet measure effect of notification statutes on communities and sex offenders).

81. See *Doe v. Poritz*, 662 A.2d 367, 387-88 (N.J. 1995) (noting that community notification laws are less common than registration laws but that pace of recently-adopted notification laws suggests they may become common).

82. See ALASKA STAT. § 18.65.087 (1995); LA. REV. STAT. ANN. § 15:546A (West Supp. 1995); N.J. STAT. ANN. § 2C:7-6 to -11 (West 1995); TENN. CODE ANN. § 40-39-106(c) (Supp. 1995); WASH. REV. CODE ANN. § 71.09.120 (West 1992 & Supp. 1995).

83. See Community Protection Act, ch. 3, §§ 101-1406, 1990 Wash. Laws 12 (1990) (codified as amended in scattered sections of WASH. REV. CODE) (providing for community notification provisions). Under Washington's notification provisions, public agencies are authorized to release relevant information when necessary to protect the public concerning a specific sexual predator or sexual psychopath. WASH. REV. CODE ANN. § 71.09.120 (West 1992 & Supp. 1995).

Furthermore, the statute provides for official immunity in the dissemination of information. *Id.* § 4.24.550(2). Elected public officials, public employees or public agencies are "immune from civil liability for damages for any discretionary decision to release relevant and necessary information" unless it is shown that the individual or agency acted with "gross negligence or in bad faith." *Id.* Public officials, public employees and public agencies are also immune from liability for the failure to release information as provided in § 4.24.550. *Id.* § 4.24.550(4).

community notification and registration statute in 1992.<sup>84</sup> In 1994, the New Jersey Community Notification Bill became law<sup>85</sup> and the Alaska Legislature amended its laws to provide for public notification.<sup>86</sup> On January 1, 1995, the Tennessee notification statute went into effect.<sup>87</sup> These statutes are among the first of their kind and each contains provisions similar to the notification measures prescribed in the Federal Crime Bill.<sup>88</sup>

Although there have been few constitutional challenges to community notification laws, given the "newness" of these statutes, future challenges will undoubtedly be brought following the states' implementation of notification programs as the Federal Crime Bill requires.<sup>89</sup> A starting point in determining the validity of such laws, however, is *Artway v. Attorney General*,<sup>90</sup> *Doe v. Poritz*<sup>91</sup> and *State v. Babin*.<sup>92</sup> In *Artway* and *Doe*, the plaintiffs challenged New Jersey's sexual offender registration law<sup>93</sup> and community notification law<sup>94</sup>—popularly referred to as Megan's Law—on

---

84. See LA. REV. STAT. ANN. § 15:546A (West Supp. 1995). Under the statute, "criminal justice agencies [may] release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection." *Id.* The statute further provides for immunity from civil liability for damages for any discretionary decision to release information unless it is shown that the disseminating official or agency acted with "gross negligence or in bad faith." *Id.* § 15:546B. Moreover, no liability shall be imposed upon any official or agency for failing to release information on registrants. *Id.* § 15:546C.

85. See Act of Oct. 31, 1994, ch. 128, 1994 N.J. Laws 526 (codified at N.J. REV. STAT. § 2C:7-6). For a further discussion of New Jersey's Community Notification Act and the state's Violent Predator Incapacitation Act of 1994, see *supra* notes 4-5.

86. See Act effective Aug. 10, 1994, ch. 41, 1994 Alaska Sess. Laws 171 (amending ALASKA STAT. § 18.65.087 to provide for public disclosure of sex offender registry data including offender's name; address; photograph; place of employment; date of birth; crime of conviction; date of conviction; place and court of conviction; and length of sentence).

87. TENN. CODE. ANN. § 40-39-106(c) (Supp. 1995) (permitting local law enforcement agencies to release relevant information as necessary to protect public regarding specific sex offender).

88. See 42 U.S.C.A. § 14071 (West 1995). For a discussion of the community notification provisions of the Federal Crime Bill, see *infra* notes 133-37 and accompanying text.

89. *Id.* For a discussion of the Federal Crime Bill provisions that require each state to establish a community notification program, see *infra* notes 122-32 and accompanying text.

90. 876 F. Supp. 666 (D.N.J. 1995).

91. 662 A.2d 367 (N.J. 1995).

92. 637 So. 2d 814 (La. Ct. App.), *cert. denied*, 644 So. 2d 649 (La. 1994).

93. N.J. STAT. ANN. § 2C:7-1 to -5 (West 1995).

94. *Id.* § 2C:7-6 to -11.

constitutional grounds.<sup>95</sup> In *Babin*, the plaintiff challenged the constitutionality of Louisiana's community notification law.<sup>96</sup>

In *Artway*, the plaintiff asserted, inter alia, that Megan's Law violated the prohibition against ex post facto laws.<sup>97</sup> The United States District Court for the District of New Jersey noted that the New Jersey Legislature intended Megan's Law to be regulatory and non-punitive in nature.<sup>98</sup> The court, however, engaged in ex post facto analysis to determine the "true nature" of the law.<sup>99</sup> It concluded that the public notification provisions of Megan's Law constituted "more a form of punishment than a regulatory

95. *Artway v. Attorney General*, 876 F. Supp. 666, 667 (D.N.J. 1995); *Doe*, 662 A.2d at 380. The sexual offender registration and notification provisions are part of a package of New Jersey bills designed to deal more harshly with sex offenders. Act of Oct. 31, 1994, 1994 N.J. Sess. Law Serv. 526, 538 (West). For a further discussion of the New Jersey community notification and registration acts, see *supra* note 5 and accompanying text.

96. *Babin*, 637 So. 2d at 817, 823-24. For a further discussion of *Babin*, see *infra* notes 113-16 and accompanying text.

97. *Artway*, 876 F. Supp. at 668. The plaintiff asserted that the registration and notification requirements deprived him of "his right to due process, equal protection and privacy, that it violate[d] the constitutional prohibition against cruel and unusual punishment [and] the prohibition against ex post facto laws, and that it constitute[d] a bill of attainder." *Id.* The court, however, examined only the constitutional challenges that the court perceived as having particular validity and declined to address the plaintiff's due process and equal protection arguments. *Id.* at 671. Moreover, the court elected to address the plaintiff's Eighth Amendment, right to privacy and double jeopardy arguments, to the extent they were relevant, in its ex post facto analysis. *Id.* at 677-85. Finally, the court held that Megan's Law did not violate the prohibition against bills of attainder. *Id.* at 684.

98. *Id.* at 673 (noting legislature's stated aim that Megan's Law be regulatory and non-punitive). The New Jersey statute reads in pertinent part:

The Legislature finds and declares:

a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children . . . require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.

b. A system of registration of sex offenders . . . will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

N.J. STAT. ANN. § 2C:7-1 (West 1995).

99. *Artway*, 876 F. Supp. at 673. The court noted that it "must focus on the practical purpose and effect of the statute and reach an independent conclusion as to its true nature." *Id.* First, the court acknowledged that the challenged statute, Megan's Law, was retrospective in application. *Id.* The court noted that, therefore, it was required to engage in ex post facto analysis, which begins with a determination of whether Megan's Law is regulatory or punitive. *Id.* Although the New Jersey Legislature stated that Megan's Law was regulatory, the court noted that the proper inquiry should focus on the "practical purpose and effect" of the law. *Id.* The court's analysis of the law's effect was conducted using the factors prescribed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Artway*, 876 F. Supp. at 673, 688-92. For a discussion of the court's application of the *Mendoza-Martinez* factors, see *infra* note 100 and accompanying text. For a discussion of ex post facto analysis, see *supra* notes 30-32 and accompanying text.

scheme" and therefore were unconstitutional in their retroactive application.<sup>100</sup>

In contrast to the district court's holding in *Artway*, the Supreme Court of New Jersey upheld the constitutionality of the registration and community notification provisions of Megan's Law in *Doe v. Poritz*.<sup>101</sup> The plaintiff *Doe* claimed that Megan's Law violated the Federal and State constitutional prohibitions against Ex Post Facto laws, Bills of Attainder, Double Jeopardy, and Cruel and Unusual Punishment, in addition to constituting an invasion of privacy and a violation of the Equal Protection and procedural Due Process Clauses of the United States Constitution and the New Jersey Constitution.<sup>102</sup>

First, the *Doe* court reasoned that Megan's Law did not constitute "punishment" and therefore did not violate the Ex Post Facto, Bill of Attainder, Double Jeopardy, or Cruel and Unusual Punishment Clauses.<sup>103</sup>

---

100. *Artway*, 876 F. Supp. at 692. The court first held the registration provisions of Megan's Law to be constitutional. *Id.* at 688. Next, it analyzed whether the effect of the notification provisions constituted punishment within the meaning of the Ex Post Facto Clause. *Id.* The court applied the *Mendoza-Martinez* factors and made the following determinations: that the public dissemination of registrant information involves an affirmative disability or restraint; that the public dissemination of registrant information would have been historically regarded as punishment; that the operation of Megan's Law promotes deterrence, one of the tradition aims of punishment; that the behavior to which Megan's Law applies is already a crime; that although an alternate purpose may be rationally assignable to Megan's Law, its inherent punitive aspect weighs in favor of finding the law punitive; and that Megan's Law appears excessive in relation to the alternative purpose of facilitating law enforcement. *Id.* at 688-92. The court also noted, however, that the registration requirements of Megan's Law are triggered only after scienter or criminal *mens rea* has been proven. *Id.* at 689. It determined that this "scienter" factor weighed in favor of finding the law to be regulatory. *Id.* at 689-90.

The court concluded that, on balance, the legislature's stated non-punitive intent was "outweighed" by the court's determinations under the *Mendoza-Martinez* factors. *Id.* at 692. It is important to note that the court addressed the constitutionality of Megan's Law only as the law is applied retroactively; the court declined to rule on application of the law to offenders whose convictions followed the law's October 31, 1994 enactment. *Id.* For a further discussion of the *Mendoza-Martinez* factors, see *supra* note 32.

101. 662 A.2d 367, 372 (N.J. 1995). The court acknowledged, however, that the prosecutor's decision to provide community notification is subject to constitutionally required judicial review. *Id.*

102. *Id.* at 380, 388-417. The Supreme Court of New Jersey noted that *Doe's* ex post facto and bill of attainder claims applied only to previously convicted offenders. *Id.* The remaining claims applied to *Doe* as well as to individuals convicted after the enactment of Megan's Law. *Id.*

103. *Id.* at 403-06. The court rejected use of the *Mendoza-Martinez* factors to determine whether the laws constituted punishment within the double jeopardy and ex post facto context. *Id.* at 403. Instead, the court focused on the New Jersey Legislature's intent as evidenced in the history of the legislation and the recitals in the laws. *Id.* at 404. The court concluded that the laws and their implementing provisions had "solely a regulatory purpose" and therefore did not constitute punishment within the meaning of the Ex Post Facto and Double Jeopardy Clauses. *Id.* at 405. The court next addressed whether Megan's Law violated the ban against bills of attainder and the ban against cruel and unusual punishment. *Id.* at 405-06.



Second, the court addressed the plaintiff's right to privacy claim by examining whether the plaintiff had a reasonable expectation of privacy in the information disclosed and whether any intrusion on his expectation of privacy was justified.<sup>104</sup> The court concluded that the plaintiff had no expectation of privacy in the information disclosed under the registration law.<sup>105</sup> As to the disclosure of information under the notification law, however, the court stated that "considering the totality of the information disclosed to the public, the [notification law] implicates a privacy interest."<sup>106</sup> Nevertheless, the court concluded that the state's interest in public disclosure substantially outweighed the plaintiff's interest in privacy and therefore, held that disclosure was permissible.<sup>107</sup>

---

The court stated that "[b]ecause the challenged provisions do not constitute punishment, they do not violate any constitutional prohibition against punishment." *Id.* at 405. Therefore, the court concluded that the registration and notification laws did not violate the Bill of Attainder or the Cruel and Unusual Punishment Clauses of the United States Constitution or the New Jersey Constitution. *Id.* at 405-06.

104. *Id.* at 406-12. The plaintiff asserted that the registration and notification laws "impermissibly infringe[d] on his interest in confidentiality." *Id.* at 406. The court framed its analysis as first requiring a determination as to whether the plaintiff had a "reasonable expectation of privacy in the information disclosed." *Id.* If the plaintiff did have a reasonable expectation of privacy, the second step would require the court to determine whether any intrusion on his right to privacy was justified by balancing the governmental interest in disclosure against the plaintiff's private interest in confidentiality. *Id.*

105. *Id.* at 408. The court reasoned that "New Jersey specifically guarantees public access to . . . criminal records;" that the state Parole Board was already required to give public notice prior to considering any adult inmate for release; and that prosecutors were required to notify crime victims of a defendant's release from custody. *Id.* at 407. In addition, the disclosure of an individual's age and legal residence or a description of his vehicle would not infringe on any expectation of privacy, as "that information is readily available through public records." *Id.* Next, the court noted that "an individual cannot expect to have a constitutionally protected privacy interest in matters that are exposed to public view," such as his physical appearance. *Id.* Finally, the court stated that there is no reasonable expectation of privacy in one's fingerprints. *Id.*

106. *Id.* at 409. The court held that under the notification law, the plaintiff had no expectation of privacy in his name, convictions, appearance, place of employment or school attended. *Id.* at 408. As to the disclosure of the plaintiff's home address, however, the court held that this implicated his privacy interests, stating that "[w]e are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* (citing *United States Dep't of Defense v. Federal Labor Relations Auth.*, 114 S. Ct. 1006, 1015 (1994)). The question was "whether inclusion of the address in the context of the particular requested record raises significant privacy concerns, for example, because the inclusion of the address can invite unsolicited contact or intrusion based on the additional revealed information." *Id.* at 409. The court concluded that the plaintiff's privacy interests were implicated given the totality of the information disclosed. *Id.*

107. *Id.* at 411. The court considered the following factors to determine whether the state's interest justified disclosure: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to

Finally, the court addressed the plaintiff's equal protection<sup>108</sup> and procedural due process arguments.<sup>109</sup> The court held that the registration and notification laws did not violate his right to equal protection under the Federal or State Constitutions.<sup>110</sup> As to the procedural due process argument, the court agreed with the plaintiff, noting that his interest in the nondisclosure of information and his interest in reputation constituted protectible liberty interests.<sup>111</sup> The court concluded, however, that Tiers Two and Three of Megan's Law required a hearing prior to notification, thereby safeguarding the plaintiff's liberty interests.<sup>112</sup>

The Louisiana notification statute was challenged on constitutional grounds in *State v. Babin*.<sup>113</sup> The defendant alleged, inter alia, that the probation conditions that required the defendant to notify community residents of his status as a convicted sex offender amounted to cruel and unusual punishment.<sup>114</sup> The court declined to address Babin's cruel and

---

prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access. *Id.* (citing *Faison v. Parker*, 823 F. Supp. 1198, 1201 (E.D. Pa. 1993)). The court further noted that "[t]he state interest in protecting the safety of members of the public from sex offenders is clear and compelling." *Id.* at 412.

108. *Id.* at 413. The plaintiff asserted that the notification and registration requirements violated his right to equal protection because he was "entitled to be treated as an individual and not classified with other sex offenders who, unlike plaintiff, had not successfully completed treatment at the [state hospital for sex offenders]." *Id.*

109. *Id.* at 417. The plaintiff argued that the dissemination of information under the notification law impinged on his interest in nondisclosure and that classification under the notification law, with disclosure, thereby infringed on his interest in reputation. *Id.* The court agreed that both interests constituted protectible liberty interests and therefore procedural protection was due. *Id.*

110. *Id.* at 415. The court applied rational basis review after noting that "[a] classification that does not impact a suspect class or impinge upon a fundamental constitutional right will be upheld if it is rationally related to a legitimate government interest." *Id.* at 413 (citing *Brown v. City of Newark*, 552 A.2d 125 (1989)). The court then looked to one of its earlier decisions which held that creating a separate classification for repetitive-compulsive sex offenders has a rational basis. *Id.* at 414 (citing *State v. Wingler*, 135 A.2d 468 (1957)). Finally, the court noted that "[t]he Legislature has determined that convicted sex offenders represent a risk to the public safety and that knowledge of their identities and whereabouts is necessary for protection of the public." *Id.* The court reasoned that because the registration and notification requirements were rationally related to that legitimate state interest, the requirements of equal protection were satisfied. *Id.*

111. *Id.* at 417. The court held that the plaintiff was entitled to procedural protection because the statute implicated protectible liberty interests. *Id.*

112. *Id.* at 421. For a discussion of the three notification tiers established under Megan's Law, see *supra* note 5.

113. 637 So. 2d 814 (La. Ct. App.), *cert. denied*, 644 So. 2d 649 (La. 1994).

114. *Id.* at 817. The State charged Babin with the molestation of a juvenile over whom he had supervision. *Id.* at 816. Following a bench trial, the judge found Babin guilty as charged. *Id.* The trial court suspended Babin's prison term and placed him on supervised probation for five years subject to the following special conditions:

unusual punishment argument and instead vacated the community notification conditions of his probation on ex post facto grounds.<sup>115</sup> The court held that the notification statute could not be applied as a condition of Babin's probation because the statute was not in effect at the time he committed his crime of conviction.<sup>116</sup>

*Artway*, *Doe* and *Babin* collectively reflect a division in the courts' application of community notification statutes to released sex offenders.<sup>117</sup> Under the reasoning of *Artway* and *Babin*, courts may hold that retroactive application of public notification statutes violates the constitutional prohibition against ex post facto laws.<sup>118</sup> Alternatively, courts may defer to state

---

(1) that he serve one year in . . . jail with credit for time served; (2) that [he] submit to psychological evaluation and, if indicated, obtain psychiatric counselling for the entire period of his probation unless discharged earlier; (3) [that he] . . . give notice of the crime for which he was convicted, his name and address to: (A) . . . people . . . who live within a one mile radius [from] where [Babin] will reside upon release on probation; (B) [t]he superintendent of the school district where [Babin] will reside . . . ; (4) [that he] give notice of the crime for which he was convicted, his name [and] his address by mail to all people residing within the designated area within . . . 30 days of sentencing or within . . . 30 days of setting up residency . . . and the notice shall be published on two separate days within this . . . 30 days [sic] period . . . in the official journal of the governing authority of the parish where [Babin] plans to reside . . . , and that [Babin] shall state under oath where he will reside after sentencing and that he will advise the Court of any subsequent change of address during the probationary period; (5) that he pay a probation supervision fee of \$30.00 per month; (6) that he perform . . . 100 hours of community service . . . .

*Id.* at 824.

On appeal, Babin advanced various procedural assignments of error. *Id.* at 816-17. As to his constitutional argument, he asserted that the conditions of his probation amounted to cruel and unusual punishment in violation of his federal and state constitutional rights. *Id.* at 817. Specifically, Babin challenged the notification provisions as being "unduly onerous" and asserted that the notification requirement would subject him to possible vigilante attacks. *Id.* at 823-24.

115. *Id.* at 824. The court vacated two of the six conditions of Babin's probation. *Id.* The first vacated condition required Babin to give notice of his crime of conviction, name and address to people residing within a one mile radius of where he intended to reside. *Id.* The second vacated condition required Babin to give notice, within 30 days of setting up residency, of his crime of conviction, name and address by publication and by mail "to all people residing within the designated area." *Id.*

116. *Id.* Babin's offense occurred over a period extending from January 1989 through February 1992. *Id.* The notification statute, however, took effect on August 21, 1992. *Id.* The court reasoned that because the notification provisions were not in effect at the time Babin committed his crime, application of the statute to Babin would be an "unconstitutional violation of the ex post facto provisions in the [United States] and Louisiana Constitutions." *Id.*

117. For a further discussion of *Artway*, see *supra* notes 97-100 and accompanying text. For a further discussion of *Doe*, see *supra* notes 101-12 and accompanying text. For a further discussion of *Babin*, see *supra* notes 113-16 and accompanying text.

118. *Artway v. Attorney General*, 876 F. Supp. 666, 692 (D.N.J. 1995) (holding notification law constituted more a form of punishment than regulatory scheme

legislatures that emphasize a regulatory intent behind the enactment of notification laws and hence find that these laws do not constitute punishment within the meaning of the Ex Post Facto Clause.<sup>119</sup>

*B. Federal Legislation that Requires States to Establish Community Notification Programs*

On September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, popularly referred to as the Crime Bill.<sup>120</sup> The various chapters of the Crime Bill provide a uniform approach to many areas of law enforcement, one of which is directed toward released sex offenders.<sup>121</sup>

Title XVII of the Crime Bill, entitled the "Jacob Wetterling Crimes Against Children and Sexual Violent Offender Registration Program," requires the states to establish registration programs for released sex offenders pursuant to guidelines set by the Attorney General.<sup>122</sup> Basically, these state programs must require that certain individuals register with local law enforcement agencies upon the individuals' release from prison.<sup>123</sup> Registration is required of any person "convicted of a criminal offense . . .

---

and therefore was unconstitutional in its retroactive application); *Babin*, 637 So. 2d at 824 (holding notification statute could not be applied retroactively to defendant).

119. *Doe v. Poritz*, 662 A.2d 367, 403-06 (N.J. 1995) (focusing on state legislature's intent as evidenced in history of notification legislation and recitals in law and concluding that notification law and implementing provisions had solely regulatory purpose and therefore did not constitute punishment within meaning of Ex Post Facto and Double Jeopardy Clauses).

120. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 42 U.S.C.A.). For the legislative history of the Violent Crime Control and Law Enforcement Act, see 1994 U.S.C.C.A.N. 1801 (reprinting various Judiciary Committee and Conference House Reports from Congressional Record volumes 139 and 140).

121. 42 U.S.C.A. § 14071 (West 1995). For the text of other topics that the Crime Bill addressed, see *id.* § 13701 (prisons); *id.* § 13741 (crime prevention); *id.* § 13931 (violence against women); *id.* § 14051 (drug control); *id.* § 14061 (criminal street gangs); *id.* § 14081 (rural crime); *id.* § 14091 (training and education of police corps and law enforcement officers); *id.* § 14131 (state and local law enforcement quality assurance and proficiency testing standards); *id.* § 14171 (motor vehicle theft prevention); *id.* § 14181 (protections for elderly); *id.* § 14191 (Presidential summit on violence and national commission on crime prevention and control); *id.* § 14211 (violent crime reduction trust fund).

122. 42 U.S.C.A. § 14071. The Crime Bill directs the Attorney General to establish guidelines for state registration programs. *Id.* § 14071(a)(1). For the complete text of the Attorney General's proposed guidelines, see 60 Fed. Reg. 18,613 (proposed Apr. 12, 1995).

123. 42 U.S.C.A. § 14071. Most states can easily meet the registration mandate of the Crime Bill because most states presently have statutes in effect that require released sex offenders to register with local law enforcement officials. For a listing and discussion of state registration statutes, see *supra* notes 23-35 and accompanying text.

against a . . . minor,"<sup>124</sup> of any person "convicted of a sexually violent offense,"<sup>125</sup> or of any person determined to be a "sexually violent predator."<sup>126</sup>

In addition, the state registration programs must provide for the following: the transfer of information to the state and to the FBI;<sup>127</sup> the establishment of an offender address verification procedure;<sup>128</sup> the notification to law enforcement agencies of changes in the registrant's address;<sup>129</sup> and the imposition of criminal penalties if a person who is required to register fails to do so.<sup>130</sup> These programs must also set forth the duties of state prison officials or the courts with regard to the enforcement of the programs, and prescribe the period for registration.<sup>131</sup> A state that fails to implement a registration program will not be entitled to receive funds that the Bureau of Justice Assistance Grant Programs would otherwise allocate to the state.<sup>132</sup>

124. *Id.* § 14071(a)(1)(A).

125. *Id.*

126. *Id.* § 14071(a)(1)(B). Under the Crime Bill provisions, the sentencing courts of each state are required to determine whether a person is a sexually violent predator. *Id.* § 14071(a)(2). A state board composed of "experts in the field of the behavior and treatment of sexual offenders" will assist the sentencing court in making this determination. *Id.*

127. *Id.* § 14071(b)(2). The statute reads in pertinent part:

The officer or . . . court shall, within 3 days after receipt of information [regarding a person who must register], forward it to a designated State law enforcement agency. The State law enforcement agency shall immediately enter the information into the appropriate State law enforcement record system and notify the appropriate law enforcement agency having jurisdiction where the person expects to reside. The State law enforcement agency shall also immediately transmit the conviction data and fingerprints to the Federal Bureau of Investigation.

*Id.*

128. *Id.* § 14071(b)(3). Individuals required to register must verify their address on the anniversary of their initial registration date. *Id.* § 14071(b)(3)(A). Individuals can verify their address by completing the verification form that the state mails to the registrant's last reported address. *Id.* § 14071(b)(3)(A)(i). If the person fails to mail the form to the designated state law enforcement agency within 10 days after receipt, the person is in violation of the verification provisions. *Id.* § 14071(b)(3)(A)(iv). Persons required to register as sexually violent predators must verify their registration every 90 days. *Id.* § 14071(b)(3)(B).

129. *Id.* § 14071(b)(4). Registrants must immediately report any change of address to the designated state law enforcement agency. *Id.* If the registrant moves to another state, the state agency must notify designated law enforcement officials of the new state into which the registrant moves. *Id.*

130. *Id.* § 14071(c). The statutory section provides in pertinent part that "[a] person required to register under a State program . . . who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed." *Id.*

131. *Id.* § 14071(b)(1), (b)(6)(A).

132. *Id.* § 14071(f)(2). The Bureau of Justice Assistance Grant Programs sets procedures for the allocation and distribution of funds to the states to improve the states' criminal justice systems and to assist multi-state organizations in the drug control problem. *Id.* § 3751(a). Ten percent of the funds a state would have been

One of the more controversial provisions of Title XVII of the Crime Bill provides for community notification when a sexually violent predator moves into a neighborhood after his or her release from prison.<sup>133</sup> Generally, the state registration programs must treat registrant information as private data.<sup>134</sup> The release of information, however, is permitted if "necessary to protect the public concerning a specific person required to register."<sup>135</sup> Essentially, the statute grants local law enforcement authorities broad discretion in determining whether to disseminate information regarding a particular registrant.<sup>136</sup> In addition, disseminating officials are immune from liability under the Crime Bill for "good faith conduct."<sup>137</sup>

### III. THE PROBLEM WITH DETERMINING WHEN DISCLOSURE TO THE COMMUNITY IS APPROPRIATE

The Crime Bill and state notification statutes have left two problems unaddressed that call into question the viability of community notification schemes. First, both the Crime Bill and many state notification statutes fail

allocated will be withheld if a state fails to comply with the registration provisions. *Id.* § 14071(f)(2).

133. *Id.* § 14071(d). This provision is entitled "Release of Information" and states in pertinent part:

The information collected under a State registration program shall be treated as private data except that —

(1) such information may be disclosed to law enforcement agencies for law enforcement purposes;

(2) such information may be disclosed to government agencies conducting confidential background checks; and

(3) the designated State law enforcement agency and any local law enforcement agency authorized by the State agency may release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

*Id.*

134. *Id.*

135. *Id.* § 14071(d)(3). The statute reads in pertinent part, "information collected under a State registration program shall be treated as private data except that . . . the designated State law enforcement agency . . . may release relevant information . . . [as] necessary to protect the public concerning a specific person required to register under this section." *Id.*

136. *Id.* While the Attorney General must establish guidelines for developing state registration programs, the Attorney General is not required to specify the amount of discretion vested in local law enforcement officials in making decisions to disseminate registrant data. *See id.* § 14071(a), (d) (specifying mandatory actions and failing to include any provision regarding scope of discretion).

137. *Id.* § 14071(e). This subsection, entitled "Immunity For Good Faith Conduct," provides that "[l]aw enforcement agencies, employees of law enforcement agencies, and State officials shall be immune from liability for good faith conduct under this section." *Id.* Thus, it appears that the only check on the conduct of local law enforcement authorities is the requirement that they disseminate information in "good faith." *See id.* (providing no other requirements within subsection).

to safeguard against the erroneous dissemination of information, which may implicate an individual's right to privacy.<sup>138</sup> Second, these statutes require that officials determine an individual's potential for future dangerousness based on the individual's past behavior, a task that is not without its difficulties.<sup>139</sup>

The possibility that notification laws will encourage the erroneous dissemination of registrant information implicates two diverging interests: an individual's right to privacy and a community's interest in notification.<sup>140</sup> The Supreme Court has recognized certain privacy rights arising from the due process guarantees of the Fifth<sup>141</sup> and Fourteenth Amendments.<sup>142</sup> The right to privacy restricts governmental action in areas concerning an individual's interest in making decisions concerning certain fundamental matters<sup>143</sup> and an individual's interest in avoiding the disclosure of personal information.<sup>144</sup>

---

138. See, e.g., *id.* (providing immunity from liability for good faith but erroneous dissemination of information); N.J. STAT. ANN. § 2C:7-9 (West 1995) (providing immunity from civil and criminal liability for providing or failing to provide information); WASH. REV. CODE ANN. § 4.24.550(2) (West Supp. 1995) (providing immunity from civil liability for releasing or failing to release information).

139. See, e.g., 42 U.S.C.A. § 14071(a)(2)-(3) (permitting sentencing court to make sexually violent predator determination upon receiving report from state board of behavioral experts and defining "sexually violent predator" as person convicted of sexually violent offense who suffers from disorder making person likely to engage in predatory sexually violent offenses); N.J. STAT. ANN. § 2C:7-8 (providing notification guidelines for determining offender's risk of re-offense based on factors relating to offender's past conduct); WASH. REV. CODE ANN. § 71.09.020(1) (West 1992 & Supp. 1995) (providing for individual's classification as sexually violent predator based on prior conviction and predicted future propensity to perform predatory acts of sexual violence); see also Joseph J. Romero & Linda Meyer Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Followup Study*, 49 FED. PROBATION 58, 63-64 (1985) (noting significant differences in criminal histories of sex offenders and gaps in understanding sex offender recidivism).

140. See, e.g., *Doe v. Poritz*, 662 A.2d 367, 411 (N.J. 1995) (finding that notification statute implicates both privacy interest of sex offender and state interest justifying disclosure). In *Doe*, the Supreme Court of New Jersey balanced the plaintiff's interest in privacy against the state's interest in disseminating registration information and concluded that the state interest in public disclosure substantially outweighed the plaintiff's interest in privacy. *Id.* at 406-13. For a further discussion of *Doe*, see *supra* notes 101-12 and accompanying text.

141. See U.S. CONST. amend. V. The Fifth Amendment of the United States Constitution provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law." *Id.*

142. See *id.* amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

143. See *Whalen v. Roe*, 429 U.S. 589, 600 n.26 (1977) (noting liberty interest in making certain important decisions in matters concerning marriage, procreation, contraception, family relationships, child rearing and education); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that right to privacy constitutes fundamental right and protects women's decision whether to have abortion).

144. *Whalen*, 429 U.S. at 599 (recognizing individual interest in avoiding disclosure of personal matters); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (invalidating state law forbidding contraceptive use because enforcement of stat-

The right to privacy that community notification laws implicate is the individual's right to limit disclosure of information about himself or herself.<sup>145</sup> An individual's right of privacy, however, is not without limits.<sup>146</sup> The United States District Court for the Eastern District of South Carolina noted in an action for invasion of privacy that the right of privacy is not absolute and, in most cases, the court must resolve a conflict between the rights of the individual and the interests of society and a free press.<sup>147</sup> The court recognized that the public has an interest in the dissemination of news and the press has a duty to publish such news, qualified only by the law of libel and an individual's right to have his private life protected.<sup>148</sup>

Information regarding the release of a convicted sex offender into a community is arguably newsworthy.<sup>149</sup> For example, the Louisiana legislature addressed the privacy issues presented by community notification laws

---

ute would violate right to privacy by requiring investigation into intimate aspects of marriage); see also Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 487 (1990) (describing one branch of privacy law to be extent to which persons may limit dissemination of information about themselves). Professor Turkington explained that the right to informational privacy has multiple branches which are "granted in the common law of torts, contracts, estates, federal and state constitutions, federal and state statutes, and federal and state agency regulations." *Id.* (footnotes omitted).

145. See *Whalen*, 429 U.S. at 598-99 (recognizing privacy right to safeguard personal information but holding that state interest in compiling data on prescription drug use outweighed plaintiffs' privacy rights); *Doe v. Borough of Barrington*, 729 F. Supp. 376, 385 (D.N.J. 1990) (holding that resident's constitutional right to privacy was violated when borough's agents disclosed that resident was infected with HIV); *Woods v. White*, 689 F. Supp. 874, 875 (W.D. Wis. 1988) (concluding that state correctional facility medical personnel violated individual's right to privacy by disclosing prison inmate's status as HIV-positive to nonmedical prison staff and other prison inmates), *aff'd without opinion*, 899 F.2d 17 (7th Cir. 1990); *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 44 (Cal. 1971) (holding that individual established cause of action for invasion of privacy based on publication of individual's prior criminal conviction).

146. See, e.g., *Firth v. Associated Press*, 176 F. Supp. 671, 674 (E.D.S.C. 1959). In *Firth*, the United States District Court for the Eastern District of South Carolina addressed whether publication of the plaintiffs' picture violated their right to privacy. *Id.* at 673-74. The plaintiffs were charged in the beating of a Camden, New Jersey man. *Id.* at 673. The Associated Press made a composite wirephoto of the plaintiffs and disseminated the photo by wire to its subscribers. *Id.* The plaintiffs sued for invasion of privacy and libel. *Id.* The court stated that "[t]he public had a right to know the facts and this right . . . was paramount to that of the plaintiffs." *Id.* at 676. The court reasoned that by the issuance of a warrant and the arrest of the plaintiffs, they became figures of public interest; therefore, the publication of their pictures was not an unwarranted invasion of their privacy. *Id.*

147. *Id.* at 674.

148. *Id.*

149. See, e.g., Gwen Florio, *The Legal Challenges of Megan's Law*, PHILA. INQUIRER, Jan. 29, 1995, at C1. Florio reports that within a week of Megan Kanka's death, "people started clamoring for a way to let New Jersey neighborhoods know when sex offenders were in their midst." *Id.*



and stated its view that sexual offenders have a reduced expectation of privacy because of the interest in public safety.<sup>150</sup> Moreover, the New Jersey Supreme Court held in favor of community notification in *Doe v. Poritz*, reasoning that the state interest in public disclosure substantially outweighed the released offender's interest in privacy.<sup>151</sup>

The grant of discretion to law enforcement officials, combined with the immunity provisions, however, may contribute to the erroneous distribution of registrant information.<sup>152</sup> In *Doe v. Poritz*, the Supreme Court of New Jersey addressed this problem in the context of protecting a released offender's Fourteenth Amendment liberty interests in privacy and reputation.<sup>153</sup> The *Doe* court concluded that considerations of fundamental fairness required that the state provide hearings to a released offender prior to community notification in order to ensure that his classification under Megan's Law and the related consequences are "tailored to his particular characteristics and are not the product of arbitrary action."<sup>154</sup>

In an apparent contradiction to the result in *Doe* and the Louisiana legislature's determination that sex offenders have a reduced expectation of privacy, most state registration programs provide for the confidentiality of registrant information.<sup>155</sup> In many states, the data is restricted to use by

150. See LA. REV. STAT. ANN. § 15:540.A (West Supp. 1995). The statutory language provides in pertinent part:

Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Release of information about sex offenders . . . will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems.

*Id.*

151. *Doe v. Poritz*, 662 A.2d 367, 411 (N.J. 1995). The court determined that the plaintiff had only a "most limited expectation of privacy in the information" disseminated under New Jersey's notification law. *Id.* Conversely, the court determined that the state had a strong interest in protecting the safety of the public from sex offenders and characterized this interest as "clear and compelling." *Id.* at 412. For a discussion of the policy goals that notification statutes seek to serve, see Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV. 219, 245-50 (1995) (concluding that notification laws do not adequately protect offenders' privacy rights).

152. See Jolayne Houtz, *When Do You Unmask a Sexual Predator?* SEATTLE TIMES, Aug. 30, 1990, at B2 (reporting that Tacoma, Washington police twice released wrong information to press).

153. *Doe*, 662 A.2d at 417-22.

154. *Id.* at 421-22. The New Jersey notification statute allows local prosecutors to determine the means of providing notification under the guidelines that the State Attorney General promulgated. N.J. STAT. ANN. § 2C:7-8.d.(1)-(2) (West 1995). The *Doe* court, however, reasoned that community notification implicates the released offender's interests in nondisclosure and in reputation, and concluded that a pre-notification hearing was constitutionally required. *Doe*, 662 A.2d at 420-21.

155. For a listing of state statutes that prohibit the disclosure of sex offender registration information, see *supra* note 28.

local law enforcement agencies.<sup>156</sup> Thus, these registration statutes implicitly recognize that a released sex offender's right to informational privacy is worthy of statutory protection.<sup>157</sup> Most state notification statutes and the Crime Bill, however, fail to address the privacy concerns of released offenders while providing what amounts to blanket immunity from civil liability for the erroneous dissemination of registrant information.<sup>158</sup> This omission is at odds with state registration laws that provide for the limited disclosure of information.<sup>159</sup>

A second problem with community notification laws is that the success of any notification program rests, in part, on the assumption that local law enforcement officials can identify with certainty which released sex offenders constitute such a threat to society that their presence in the area merits community notification.<sup>160</sup> There is, however, no guarantee that the designated officials will accurately make such determinations.<sup>161</sup> Even

---

156. For a listing of state statutes where the registration data is generally restricted to use by local law enforcement agencies use, see *infra* note 157.

157. See, e.g., ARK. CODE ANN. § 12-12-909 (Michie Supp. 1993) (authorizing release of data to law enforcement officers); COLO. REV. STAT. § 18-3-412.5(6) (Supp. 1994) (noting that General Assembly found that persons convicted of sex offenses have reduced expectation of privacy because of public's right of safety); ILL. ANN. STAT. ch. 730, para. 150/9 (Smith-Hurd 1992 & Supp. 1995) (prohibiting public inspection of registration data); KY. REV. STAT. ANN. § 17.510(11) (Michie/Bobbs-Merrill Supp. 1994) (finding that registration information was not accessible to public); MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1995) (allowing dissemination of information for law enforcement purposes); N.H. REV. STAT. ANN. § 632-A:17 (Supp. 1994) (requiring confidentiality of information provided by individual required to report); OKLA. STAT. ANN. tit. 57, § 584 (West 1991 & Supp. 1995) (providing access to information acquired under statute only to law enforcement personnel); R.I. GEN. LAWS § 11-37-16(i) (1994) (allowing inspection of records only by law enforcement personnel); W. VA. CODE § 61-8F-5 (Supp. 1994) (same).

158. For a discussion of the relevant Crime Bill provisions, see *supra* notes 136-37 and accompanying text. For a review of Washington's statutory immunity provisions, see *supra* note 83. For a review of New Jersey's immunity provisions, see *supra* note 5. For a review of Louisiana's grant of statutory immunity, see *supra* note 84.

159. For a list of state statutes that either prohibit public disclosure of registrant information or that permit only limited disclosure, see *supra* note 28.

160. See 42 U.S.C.A. § 14071(d) (West 1995) (permitting disclosure of registrant information by state and local law enforcement officials when "necessary to protect the public concerning a specific person"). For a further discussion of state statutes that permit the disclosure of registrant information, see *supra* notes 77-119 and accompanying text.

161. See, e.g., N.J. STAT. ANN. § 2C:7-6 to -10 (West 1995). For example, in New Jersey, the determination as to whether a released sex offender poses a low, moderate or high degree of re-offense is made by a prosecutor—not by a medical professional. *Id.* Registrant information may be released to the public based on the prosecutor's decision. *Id.* In Washington, the police are permitted to release information concerning sex offenders to the public. See WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1995). Each police department is allowed to create its own notification policy. See Mary Ann Kircher, *Registration of Sexual Offenders: Would Washington's Scarlet Letter Approach Benefit Minnesota?*, 13 HAMLINE J. PUB. L. &

if erroneous information is disseminated, the Crime Bill fails to direct the states to provide procedures for redress.<sup>162</sup> On the contrary, Congress placed minimal importance on protecting offenders against the mistaken release of information by allowing state notification programs to grant official immunity from liability for the erroneous dissemination of data.<sup>163</sup>

#### IV. POSSIBLE CONSEQUENCES OF COMMUNITY NOTIFICATION

In addition to the lack of safeguards in disclosing information and the difficulty of judging future behavior based on an individual's past conduct, three additional issues went unaddressed in the frenzy surrounding the rush by states to enact community notification laws.<sup>164</sup> One issue concerns the possibility that citizens will engage in acts of vigilantism to seek retribution against released sex offenders.<sup>165</sup> Acts of vigilantism erupted shortly after the implementation of New Jersey's community notification law, when two men broke into a house and beat a man they suspected was a released sex offender.<sup>166</sup> Vigilante conduct also reportedly occurred in

---

POL'Y, 163, 171 (1992) (noting that each police department decides what information to release to each segment of population).

162. See 42 U.S.C.A. § 14071(e) (providing immunity from liability for good faith conduct without defining "good faith" or establishing procedures for violations of good faith standard).

163. *Id.* For a discussion of the Crime Bill provisions that permit community notification and that provide for official immunity, see *supra* note 133-37 and accompanying text.

164. Gladwell, *supra* note 1, at A6. Mr. Gladwell noted that "an idea that [in the fall of 1994] seemed so straightforward and common-sense that it was passed into law [in New Jersey] virtually without debate is tangled in controversy." *Id.*

165. See, e.g., *Doe v. Poritz*, 662 A.2d 367, 430 (N.J. 1995) (Stein, J., dissenting) (discussing vigilante actions taken against two released sex offenders subject to New Jersey's registration and notification provisions); Tracy L. Silva, *Dial "1-900-Pervert" and Other Statutory Measures That Provide Public Notification of Sex Offenders*, 48 SMU L. REV. 1961, 1983-84 (1995) (noting vigilante incidents occurred in Washington, Texas, New Jersey and Kansas following enactment of notification laws); Houston, *supra* note 24, at 729-30 (discussing residents' protest to return of released sex offender Joseph Gallardo to their neighborhood); Golden, *supra* note 2, at 12 (reporting that paroled sex offender Larry Singleton was evacuated from his home under guard away from angry mob and completed his parole in trailer on San Quentin prison grounds).

166. Jay Richards, *Phillipsburg Men Plead Guilty in Attack; Assault Stemmed From Megan's Law Notification*, MORNING CALL (Allentown), June 10, 1995, at B3. Kenneth Kerekes, Sr. and Kenneth Kerekes, Jr. were arrested by Phillipsburg police on January 8, 1995 for breaking into the house where released sex offender Michael Groff was staying. *Id.* Kerekes, Sr. assaulted a houseguest after mistaking him for Groff. *Id.* Groff was the first Warren County, New Jersey convicted sex offender to have his address made public under Megan's Law. *Id.* Groff had been released after serving four years of a 10-year-sentence for sexual assault and endangering the welfare of a child. *Id.* Kerekes, Sr. pled guilty to fourth-degree criminal trespassing and simple assault charges and Kerekes, Jr. pled guilty to trespassing and criminal mischief charges. *Id.*

Washington following the enactment and the implementation of Washington's sex offender legislation.<sup>167</sup>

A second issue concerns the effects of excessive ostracism directed toward the released offender.<sup>168</sup> Community residents might ostracize a released offender to the extent that he or she will be unable to assimilate into society.<sup>169</sup> The danger posed by the inability to assimilate is similar to the danger posed by acts of vigilantism; the offender may find it so difficult to live in a particular community that he or she may simply relocate elsewhere without providing notice to local authorities.<sup>170</sup>

A third issue is the possibility that community notification and registration statutes may provide residents with a false sense of security.<sup>171</sup> Basically, these laws may lead residents to believe that local law enforcement officials and residents know the whereabouts of a particular released offender.<sup>172</sup> Ostensibly, these programs will give local officials and residents

167. Anderson, *supra* note 3, at 2-3. Anderson reports that between March 1990 and March 1993, there were 14 notification-related incidents in Washington. *Id.* These incidents ranged from "offenders, and sometimes their families, receiving taunts to a case where one offender was punched in the nose when he opened the door." *Id.*

168. See, e.g., *Doe*, 662 A.2d at 422. The Supreme Court of New Jersey noted that "[t]here is no point in predicting the extent of potential ostracism, [or] in avoiding the conclusion that some ostracism will result." *Id.*; Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 641 (1988) (noting dangerous sex offender warning requirements are not proper means for encouraging probationer's development of normal lifestyle and encouraging career and respectable friendships).

169. See, e.g., Golden, *supra* note 2, at 12 (reporting story of Alan Jay Groome who was released into Washington community after being incarcerated in juvenile lock-up for raping two boys). The Shelton school system refused to admit Groome, and after the police informed apartment complex residents about Groome's record, the apartment manager evicted Groome and his mother from their apartment. *Id.*

170. Martone, *supra* note 5, at 39 (noting that notification laws may cause sex offenders to avoid treatment and seek safety of anonymity by hiding out, thus subjecting public to greater risk).

171. Ovetta Wiggins, *Towns Consider Tracking Convicts; Critics Cite False Sense of Security*, THE RECORD (Northern N.J.), Sept. 13, 1994, at D1. Ed Martone, executive director of the American Civil Liberties Union of New Jersey, was quoted as stating that community notification laws may "create a false sense of security." *Id.* He stated that, "to think that the government is going to watch over me, it's not going to happen." *Id.*; see also Porter, *supra* note 80, at 12 (noting that trusted relatives and neighbors inflict sexual abuse more frequently than strangers).

172. See, e.g., John Sullivan, *Sexual Attack on Youth Shows 'Megan's Law' Limit*, N.Y. TIMES, Aug. 1, 1995, at B5. Twenty-eight-year-old John Edward Greene, a previously convicted sex offender, was arrested and charged with attacking a 15-year-old boy in an apartment complex four miles from the motel where Greene resided. *Id.* Greene registered with the police as required by Megan's Law, but the police did not notify the community about Greene's status because they were waiting for a court decision on the law's constitutionality. *Id.* Residents in the apartment complex, however, were aware of Greene's background because Greene's mother had told neighbors that he had recently been released from prison. *Id.* This news passed from tenant to tenant. *Id.* Thus, even though Greene registered with the police and residents knew of Green's criminal background, the attack still

some idea of where a registrant resides, but most statutes impose a duty to register with little means of enforcing this duty.<sup>173</sup> For the most part, state registration statutes and notification laws merely impose penalties on those who are required to register but fail to do so.<sup>174</sup> Two unintended

occurred. *Id.* One police detective stated, "[w]e couldn't keep Greene on any more track unless we watched him 24 hours a day and the system doesn't provide for that." Mike Kelly, *Megan's Flaw*, THE RECORD, Aug. 13, 1995, at 1.

Shortcomings are present in the Crime Bill as well, in that it only requires that sexual predators verify their address every 90 days and all other registrants provide address verification annually. 42 U.S.C.A. § 14071(b)(3)(B) (West 1995). No other procedural safeguards are required by the Crime Bill to ensure registrants actually reside where they stated they would. See *id.*

Even when a released offender registers with local law enforcement authorities, there is no guarantee that the police will be able to prevent a re-offense. Mark Davis & Chris Conway, *Molester Loses Bid in Shore Case; Wider Megan's Law Urged*, PHILA. INQUIRER, Aug. 1, 1995, at B5 (reporting released sex offender charged with sexual assault of teenager had registered with police as required under Megan's Law, but still allegedly committed sexual offense).

173. See Houston, *supra* note 24, at 740 (arguing severe penalties and law enforcement officials' willingness to prosecute offenders who fail to register are only effective means to ensure registration). For a discussion of state statutes that impose penalties on individuals for the failure to register, see *infra* note 174.

174. See, e.g., ALA. CODE § 13A-11-203 (1994) (providing for imprisonment of one to five years and fine of up to \$1,000 for failure to register); ARIZ. REV. STAT. ANN. § 13-3824 (1989) (mandating that failure to register is class six felony); ARK. CODE ANN. § 12-12-903 (Michie Supp. 1993) (providing that failure to register constitutes Class A misdemeanor); COLO. REV. STAT. § 18-3-412.5(4) (Supp. 1994) (stating that those who fail to register are guilty of class two misdemeanor or class six felony); DEL. CODE ANN. tit. 11, § 4120(g)(2) (Supp. 1994) (stating that persons who fail to register more than twice are guilty of Class G felony for all subsequent failure to register violations); FLA. STAT. ANN. § 775.22(3)(f)(1) (West Supp. 1995) (providing that failure to register constitutes third degree felony); IDAHO CODE § 18-8311 (Supp. 1995) (stating failure to register constitutes felony punishable by up to five years imprisonment and up to \$5,000 fine); ILL. ANN. STAT. ch. 730, para. 150/9 (Smith-Hurd 1992 & Supp. 1995) (providing that failure to register constitutes Class A misdemeanor); MONT. CODE ANN. § 46-23-507 (1993) (stating that failure to register may result in imprisonment for minimum of 90 days or imposition of fine up to \$250 or both); NEV. REV. STAT. ANN. § 207.157 (Michie 1992 & Supp. 1993) (providing that failure to register constitutes misdemeanor); N.J. STAT. ANN. § 2C:7-6 to -9 (West 1995) (providing that persons required to register who fail to do so are guilty of crime of fourth degree); OKLA. STAT. ANN. tit. 57, § 587 (West 1991 & Supp. 1995) (stating that person who fails to register is guilty of misdemeanor and shall be subject to incarceration for up to one year and to fines of up to \$1,000 or both); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1, § 7 (West Supp. 1995) (mandating that if person fails to register, he or she commits Class A misdemeanor); UTAH CODE ANN. § 77-27-21.5(11) (1994) (providing that sex offender who knowingly fails to register be sentenced to term of incarceration for minimum of 90 days and to probation for at least one year); WASH. REV. CODE ANN. § 9A.44.130(7) (West Supp. 1995) (mandating that one who knowingly fails to register is guilty of felony or gross misdemeanor depending on crime of conviction); WIS. STAT. § 175.45(6) (Supp. 1994) (stating that individual who intentionally fails to provide information may be fined up to \$10,000 or imprisoned for up to nine months or both). For a discussion of the Crime Bill provision that makes it unlawful to fail to register when one is required to do so, see *supra* note 130 and accompanying text.

effects of New Jersey's Megan's Law illustrate the "false sense of security" problem: released offenders have often given false addresses<sup>175</sup> or have failed to register at all.<sup>176</sup>

#### IV. CONCLUSION

The recent changes in federal and state legislation reflect a nationwide shift in concern toward victims' rights.<sup>177</sup> The movement in legislation at the state level—from requiring the registration of sex offenders to the enactment of civil commitment statutes to the emergence of community notification laws—signifies a trend toward placing increased restrictions on released sex offenders.<sup>178</sup> This trend has been reinforced by President Clinton's signing of the Crime Bill.<sup>179</sup> While the public interest in being safe from the potentially dangerous conduct of sex offenders is strong,<sup>180</sup> that interest must be evaluated against treatment and rehabilitative considerations that would serve to protect society as a whole.<sup>181</sup>

Community notification laws appear to provide a viable means of protecting citizens, but it is difficult to determine who is a "sexual predator," to ascertain what information merits dissemination, and to decide to

---

175. Gladwell, *supra* note 1, at A6. The false address problem is exacerbated by the fact that the police acknowledge that they lack the resources to check the addresses of released offenders. *Id.*

176. See Lawrence Van Gelder, *Offenders Ignore 'Megan's Law,'* N.Y. TIMES, May 2, 1995, at B1 (noting that New Jersey figures compiled to support Megan's Law show only 910 of estimated 4,000 ex-convicts, parolees and sex offenders on probation have filed their names and addresses with police).

177. Lawrence Wright, *A Rapist's Homecoming*, THE NEW YORKER, Sept. 4, 1995, at 56, 68. Wright states that "[a]ll over the country, states are passing legislation similar to Megan's Law." *Id.*

178. See *id.* (noting that 44 states require sex offenders to register with authorities, 15 states allow indefinite commitment of sex offenders and 27 states have community notification laws). For a discussion of state registration laws, civil commitment laws and community notification laws, see *supra* notes 23-119 and accompanying text.

179. For a discussion of the community notification provisions of the Crime Bill, see *supra* notes 133-37 and accompanying text.

180. See, e.g., *Doe v. Poritz*, 662 A.2d 367, 411 (N.J. 1995) (noting state interest in disclosing sex offender registration information to public substantially outweighs sex offender's interest in privacy). For a discussion of one sex offender's continued criminal sexual assaults after his release from prison, see *supra* note 43.

181. *Id.* at 422-23. The Supreme Court of New Jersey noted that "[w]hat government faced here was a difficult problem, a question of policy, and it understandably decided that public safety was more important than the potential for unfair, and even severe, impact on those who had previously committed sex offenses." *Id.*; see also Jerusalem, *supra* note 151, at 232 (asserting rehabilitation of sex offenders is preventive and should be policy objective of sex offender legislation); Tavill, *supra* note 168, at 639-42 (noting rehabilitation is important to reducing crime problems but arguing "scarlet letter" probation conditions that require signs be posted on sex offender's property warning neighbors by announcing crime committed are ineffective to rehabilitate and reform offender's behavior).

whom such information should be given.<sup>182</sup> There is general agreement, however, that no clear method of curing sexually violent offenders exists, and further, that it is not possible to make long-term predictions of dangerousness.<sup>183</sup> Challenges to community notification statutes will undoubtedly continue to be raised in the courts as an increasing number of states enact notification measures.<sup>184</sup>

Different interests are implicated by the use of registration laws, civil commitment procedures and community notification statutes.<sup>185</sup> At stake in registration statutes is an individual's interest in being free from the imposition of additional punishment in violation of the prohibition against ex post facto laws.<sup>186</sup> The primary interest at stake in civil commitment statutes concerns an individual's liberty interest in being free from unwarranted detention.<sup>187</sup> The interests at stake with regard to commu-

---

182. See *Doe*, 662 A.2d at 422 (recognizing "the unavoidable uncertainty of [the court's] conclusion" that notification law is constitutional). *Doe* illustrates the difficulty of classifying sexual offenders and of determining the type of notice required under a notification law. *Id.* at 417-22. In *Doe*, the Supreme Court of New Jersey held that a hearing is required prior to notification under Tiers Two and Three of Megan's Law. *Id.* at 421. The court reasoned that principles of fundamental fairness "require procedural protections that will ensure that [a sexual offender's] classification, and its related consequences, are tailored to his particular characteristics and are not the product of arbitrary action." *Id.* at 422; see also Julie Shapiro, *Sources of Security*, 15 U. PUGET SOUND L. REV. 843, 844 (1992) (discussing problem of accurately identifying dangerous individuals in context of civil commitment statute).

183. Reardon, *supra* note 16, at 850. The Washington State Psychiatric Association has recognized that there is no scientifically valid treatment for sexually violent predators. *Id.*

184. See, e.g., 60 Fed. Reg. 18,613 (Attorney General's proposed guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act giving states three years to develop and implement registration and notification programs); see also *Doe*, 662 A.2d at 413 (holding notification provisions of Megan's Law constitutionally sound and concluding that state interest in protecting citizens outweighed defendant's expectation of privacy). But see *Artway v. Attorney General*, 876 F. Supp. 666, 692 (D.N.J. 1995) (holding Megan's Law unconstitutional on ex post facto grounds).

185. For a discussion of the constitutional challenges raised against state registration statutes, see *supra* notes 30-35 and accompanying text. For a discussion of the constitutional challenges raised against state civil commitment statutes, see *supra* notes 46-74 and accompanying text. For a discussion of the constitutional challenges raised against community notification laws, see *supra* notes 89-119 and accompanying text.

186. See, e.g., *State v. Costello*, 643 A.2d 531, 534 (N.H. 1994) (acknowledging that individual has right to be free from imposition of additional punishment but holding registration statute does not impose additional punishment upon convicted offender in violation of Ex Post Facto Clause); *State v. Ward*, 869 P.2d 1062, 1066-68 (Wash. 1994) (same); *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992) (same).

187. See, e.g., *Young v. Weston*, 898 F. Supp. 744, 748-51 (W.D. Wash. 1995) (addressing petitioner's argument that his confinement was unconstitutional preventive detention in violation of Due Process Clause of Fourteenth Amendment).

nity notification statutes involve the individual's right to privacy and the right to be free from the imposition of additional punishment.<sup>188</sup>

While all three types of laws serve the public interest in safety,<sup>189</sup> the issue is which approach or combination of approaches best serves citizens' needs in the aggregate. The public interest in safety must be balanced against the released offender's interest in receiving treatment, rehabilitating himself or herself, and remaining safe from citizens seeking retribution or revenge. When balancing these interests, community notification laws sweep too broadly.<sup>190</sup> Mandatory registration requirements, when coupled with broad grants of discretion to local authorities to determine whether to disseminate information, have resulted in harm to innocent third parties without producing a corresponding benefit in serving the public interest in safety.<sup>191</sup> In addition, community notification laws re-

188. See, e.g., *Doe*, 662 A.2d at 387-406 (addressing petitioner's claim that Megan's Law constitutes punishment); *id.* at 406-13 (addressing petitioner's claim that Megan's Law violated his constitutional right to privacy as grounded in Fourteenth Amendment).

189. See, e.g., WASH. REV. STAT. ANN. § 71.09.010 (West 1992 & Supp. 1995) (addressing safety concerns). The Washington state legislature was concerned with the safety of its citizens when it made the legislative finding that "a small but extremely dangerous group of sexually violent predators exist [sic] who do not have a mental disease . . . that renders them appropriate for existing involuntary treatment act." *Id.* After determining that citizen safety was of significant importance, the legislature enacted procedures that allow for the civil commitment of individuals determined to be sexually violent predators. *Id.*

Similarly, the Louisiana state legislature found that "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." LA. REV. STAT. ANN. § 15:540.A (West Supp. 1995). The Louisiana statute goes further, however, by stating that an individual who has committed a sexual offense has a reduced expectation of privacy because of the state's interest in public safety and in the effective operation of government. *Id.* Thus, the Louisiana statute concludes that the "release of information about sex offenders . . . will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems." *Id.*

190. See, e.g., *Artway v. Attorney General*, 876 F. Supp. 666 (D.N.J. 1995). In *Artway*, the district court held that the Tier Two and Three notification provisions of Megan's Law constituted "more a form of punishment than a regulatory scheme" and were therefore unconstitutional as retroactively applied to the petitioner. *Id.* at 692; see also 60 Fed. Reg. 18,613 (Attorney General's proposed guidelines for states to establish registration and notification laws stating that Crime Bill does not impose any limits on standards and procedures that states may adopt for determining when public safety necessitates community notification); Silva, *supra* note 165, at 1981-82 (noting notification laws that treat high level and low level sex offenders to same stringent notification provisions result in inequitable treatment of offenders).

191. See, e.g., *Doe*, 662 A.2d at 430 (Stein, J., dissenting) (discussing vigilante incidents that occurred shortly after effective date of Megan's Law); Silva, *supra* note 165, at 1979-80 (quoting commentators' opinions regarding notification laws' inability to guarantee reduction in occurrence of sex crimes); Tavill, *supra* note 168, at 642 (asserting public notification via warning signs on released offender's property is ineffective to protect children, and that professionally educating children and enrolling offenders in intensive supervision programs for continuous



sult in the public branding of released offenders that may increase the potential for vigilante conduct. Finally, notification laws may encourage a released offender to seek anonymity by moving to a new neighborhood, thereby placing those residents at risk should the offender fail to register with law enforcement officials in his or her new community. While Congress and many state legislatures acknowledge that community notification may provide one method of helping to protect children from released sex offenders, whether the states will develop and implement constitutionally sound notification laws remains to be seen.<sup>192</sup>

*Christine M. Kong*

---

monitoring while receiving rehabilitative therapy is best solution to protect children).

192. *See, e.g.*, 60 Fed. Reg. 18,613. The United States Attorney General's proposed guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act give the states broad discretion in formulating registration and notification programs. *Id.* The proposed guidelines "give states wide latitude in designing registration programs that best meet their public safety needs" and do not impose any limits on the standards and procedures the states may adopt for determining when public safety necessitates community notification. *See id.*